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NO. _____

IN THE
Supreme Court of the United States
OCTOBER TERM, 1989

TEXACO REFINING AND MARKETING INC.
and
TEXACO MARINE SERVICES INC.,
Petitioners,

v.

THE ESTATE OF DAU VAN TRAN,
VI THI PHAM and DO VAN TRAN,
Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE NINTH DISTRICT COURT OF APPEALS OF THE STATE OF TEXAS AT BEAUMONT, TEXAS

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QUESTIONS PRESENTED FOR REVIEW

1. When an action for wrongful death arising out of a maritime tort in territorial waters is brought in state court, may the state court apply the substantive law of the state and award damages permitted by state law or does federal general maritime law pre-empt state law?

2. May a state court hold that a death caused by the negligent operation of an oceangoing vessel on navigable waters is not a maritime tort that would require application of federal maritime law?

CERTIFICATE OF INTERESTED PARTIES AND PARTIES BELOW

The following were parties in the proceedings below in addition to those parties identified in the caption hereof:

Farmer Boy's Catfish Kitchens International, Inc.
Theresa Nguyen
Anh Nguyen

The parent of Petitioner Texaco Refining & Marketing Inc. is:

TRMI Holdings Inc. which is owned by
Texaco Inc.

The parent of Petitioner Texaco Marine Services Inc. is:

Texaco Overseas Holdings Inc. which is owned by
TRMI Holdings Inc. which is owned by
Texaco Inc.

The following is a list of the subsidiaries and/or affiliates of Texaco Inc. which have publicly-held debt or equity securities:

Texaco Capital Inc.
Texaco Capital N.V.
Texaco International Finance Corp.
Texaco Inc.
Texaco Mexicana S.A. de C.V.
Texaco Togo
Texaco Nigeria Limited
Texaco Ghana Limited
Refineria Texaco de Honduras S.A.

TABLE OF CONTENTS

	Page
QUESTIONS PRESENTED FOR REVIEW	I
CERTIFICATE OF INTERESTED PARTIES AND PARTIES BELOW	II
TABLE OF CONTENTS	III
TABLE OF AUTHORITIES	V
OPINION SOUGHT TO BE REVIEWED	VII
STATEMENT OF JURISDICTION	VII
CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED IN THE CASE	VIII
STATEMENT OF THE CASE	2
REASONS FOR GRANTING THE WRIT	4
ARGUMENT	8
A. The Texas Court Erred In Holding That State Substantive Law Could Apply To A Death Occurring In Territorial Waters Caused By A Maritime Tort.	8
1) State law was applied to maritime wrongful deaths only after this Court determined that federal law did not address wrongful death.	8
2) Application of state law in death cases was an exception to the general maritime rules of uniformity and federal supremacy.	9
3) This Court created a federal maritime law remedy for wrongful death.	11
4) The rule of maritime uniformity outweighs any countervailing reasons that would permit application of state statutes to wrongful-death actions.	12
(a) *Moragne* obviated the void-filling rationale for using state statutes.	13
(b) The states' sovereignty interests in applying their death statutes have never outweighed the maritime rule of uniformity.	14
5) Those appellate courts that have considered the question have concluded that after *Moragne*, federal rather than state law applies to maritime wrongful deaths in state territorial waters.	16

Page

B. The Texas Court Mis-Applied Controlling And Important Federal Law When It Ruled That Tran's Death Did Not Involve A Maritime Tort. 19

C. If Texas Is Allowed To Apply Its Own Body Of Laws To Wrongful Death In Territorial Waters, The Effects Will Extend Far Beyond Texas. 21

D. The Texas Court Did Not Decide This Matter On An Adequate And Independent State Ground. 23

CONCLUSION AND PRAYER FOR RELIEF 26

APPENDIX A—Opinion of the Texas Court of Appeals.. 1a

APPENDIX B—Order of the Texas Supreme Court Overruling Texaco's discretionary writ of error 19a

APPENDIX C—Findings of Fact and Conclusions of Law of the District Court 21a

APPENDIX D—Final Judgment of the District Court ... 31a

APPENDIX E—Order of Texas Court of Appeals Overruling Texaco's Motion for Rehearing 34a

APPENDIX F—Order of Texas Supreme Court Overruling Texaco's Motion for Rehearing 35a

APPENDIX G—Plaintiff's Third Amended Original Petition 37a

APPENDIX H—Defendants' Motion for New Trial or, in the Alternative, to Modify, Correct or Reform the Judgment or, in the Alternative, for Remittitur 44a

APPENDIX I—Defendants' Memorandum in Support of Their Motion for New Trial or, in the Alternative, to Modify, Correct or Reform the Judgment or, in the Alternative, for Remittitur 47a

APPENDIX J—Defendants' Supplemental Memorandum in Support of Their Motion for New Trial or, in the Alternative, to Modify, Correct or Reform the Judgment or, in the Alternative, for Remittitur 59a

APPENDIX K—Motion to Amend Findings of Fact 62a

TABLE OF AUTHORITIES

CASES

	Page
Ake v. Oklahoma, 470 U.S. 68, 105 S.Ct. 1087, 84 L.Ed.2d 53 (1985)	25
Aljaro v. Dow Chemical, 33 Tex. S. Ct. J. 326 (March 28, 1990)	7, 21, 23
Cactus Drilling Corp. v. Hager, 487 S.W.2d 758 (Tex. Ct. App.—El Paso, 1972, no writ)	24
Chelentis v. Luckenbach S.S. Co., 247 U.S. 372, 38 S.Ct. 501, 62 L.Ed. 1171 (1917)	6, 10, 15, 18
Executive Jet Aviation, Inc. v. City of Cleveland, 409 U.S. 249, 93 S.Ct. 493, 34 L.Ed.2d 454 (1972)	6, 9
Exxon Corp. v. Chick Kam Choo, 817 F.2d 307 (5th Cir. 1987), *rev'd on other grounds*, 486 U.S. 140, 108 S.Ct. 1684, 100 L.Ed.2d 127 (1988)	22, 23
Foremost Ins. Co. v. Richardson, 457 U.S. 668, 102 S.Ct. 2654, 73 L.Ed.2d 300 (1982)	6, 20
International Longshoremen's Ass'n, AFL-CIO v. Davis, 476 U.S. 380, 106 S.Ct. 1904, 90 L.Ed.2d 389 (1986)	25
Just v. Chambers, 312 U.S. 383, 61 S.Ct. 687, 85 L.Ed. 903 (1941)	14
Kermerac v. Compagnie Generale Transatlantique, 358 U.S. 626, 79 S.Ct. 406, 3 L.Ed.2d 550 (1959)	18, 25
Knickerbocker Ice Co. v. Stewart, 253 U.S. 149, 40 S.Ct. 438, 64 L.Ed. 834 (1920)	10
Land Title Co. of Dallas, Inc. v. F.M. Stigler, Inc., 609 S.W.2d 754 (Tex. 1980)	24
Lyon v. Ranger III, 858 F.2d 22 (1st Cir. 1988)	5, 16
Martin v. Walk, Haydel & Associates, Inc., 794 F.2d 209 (5th Cir. 1986)	3
Matter of S/S HELENA, 529 F.2d 744 (5th Cir. 1976)	5, 14, 16
Michigan v. Long, 463 U.S. 1032, 103 S.Ct. 3469, 77 L.Ed. 2d 1201 (1983)	25
Mobil Oil Corp. v. Higginbotham, 436 U.S. 618, 98 S.Ct. 2010, 56 L.Ed.2d 581 (1978)	16
Moragne v. States Marine Lines, Ltd., 398 U.S. 375, 90 S.Ct. 1772, 26 L.Ed.2d 339 (1970)	*passim*
Nelson v. United States, 639 F.2d 469 (9th Cir. 1980)	5, 14, 16
Offshore Logistics, Inc. v. Tallentire, 477 U.S. 207, 106 S.Ct. 2485, 91 L.Ed.2d 174 (1986)	5, 15, 16, 17, 18
Petition of United States Steel Corp., 436 F.2d 1256 (6th Cir. 1970), *cert. denied*, 402 U.S. 987, 91 S.Ct. 1649; *reh'g denied* 403 U.S. 924, 403 U.S. 940, 91 S.Ct. 2247 (1971)	5, 6, 16

CASES

	Page
Romero v. International Terminal Operating Co., 358 U.S. 354, 79 S.Ct. 468, 3 L.Ed.2d 368 (1959)	13
Sea-Land Services, Inc. v. Gaudet, 414 U.S. 573, 94 S.Ct. 806, 39 L.Ed.2d 9 (1974)	3
Southern Pacific Co. v. Jensen, 244 U.S. 205, 37 S.Ct. 524, 61 L.Ed. 1086 (1917)	9, 10
Texaco Refining & Marketing, Inc. v. Estate of Tran, 777 S.W.2d 783 (Tex. Ct. App.—Beaumont, 1989)	*passim*
The Hamilton, 207 U.S. 398, 28 S.Ct. 133, 52 L.Ed. 264 (1907)	8, 9, 10
The Harrisburg, 119 U.S. 199, 7 S.Ct. 140, 30 L.Ed. 358 (1886)	8, 11
The Tungus v. Skovgaard, 358 U.S. 588, 79 S.Ct. 503, 31 L.Ed.2d 524 (1959)	11, 14

UNITED STATES CONSTITUTION

Article I, § 8, cl. 18	VIII, 10
Article III, § 2, cl. 1	IX, 10

UNITED STATES STATUTES

28 U.S.C. § 1257	VII
28 U.S.C. § 1333	17
28 U.S.C. § 1333(1)	17
46 U.S.C. § 688	9
46 U.S.C. § 740	VIII, 6, 20
46 U.S.C. § 761 *et seq.*	8
46 U.S.C. § 767	VIII, 9, 15

UNITED STATES SUPREME COURT RULES

Rule 10.1(b)	7
Rule 10.1(c)	7
Rule 13.1	VII
Rule 13.3	VII

TEXAS RULES OF CIVIL PROCEDURE

Rule 90	24
Rule 329b(c)	3

TEX. CIV. PRAC. & REM. CODE ANN.

Section 71.031(c) (Vernon 1986)	21

OPINION SOUGHT TO BE REVIEWED

The opinion of the Texas Court of Appeals that Texaco seeks to have reviewed was reported as *Texaco Refining & Marketing, Inc. v. Estate of Tran*, 777 S.W.2d 783 (Tex. Ct. App.—Beaumont, 1989). It is reproduced as Appendix A to this petition.

STATEMENT OF JURISDICTION

Petitioners seek review of an opinion of the Ninth District Court of Appeals for the State of Texas at Beaumont, Texas. That opinion, (App. A at 2a), was issued on August 31, 1989. A judgment on the opinion was also entered that day. (Appendix A at 1a).

The appellate court denied Texaco's motion for rehearing on September 27, 1989. (Appendix E at 34a). Texaco then petitioned the Texas Supreme Court for a discretionary writ of error. The Texas Supreme Court denied that petition without comment on January 3, 1990. (Appendix B at 19a). Texaco then sought rehearing of the Texas Supreme Court's denial of the writ of error petition, and that motion for rehearing was denied on February 7, 1990. (Appendix F at 35a).

This petition is therefore timely under this Court's Rules 13.1 and 13.3 because the petition is filed within 90 days of the Texas Supreme Court's final denial of relief to Texaco.

This Court has jurisdiction to consider this petition under 28 U.S.C. § 1257.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED IN THE CASE

46 U.S.C. § 740

The admiralty and maritime jurisdiction of the United States shall extend to and include all cases of damage or injury, to person or property, caused by a vessel on navigable water, notwithstanding that such damage or injury be done or consummated on land.

In any such case suit may be brought in rem or in personam according to the principles of law and the rules of practice obtaining in cases where the injury or damage has been done and consummated on navigable water:

* * *

46 U.S.C. § 767

The provisions of any State statute giving or regulating rights of action or remedies for death shall not be affected by this chapter. Nor shall this chapter apply to the Great Lakes or to any waters within the territorial limits of any State, or to any navigable waters in the Panama Canal Zone.

U.S. Const. art. I, § 8, cl. 18

To make all Laws which shall be necessary and proper for carrying into Execution the foregoing Powers, and all other Powers vested by this Constitution of the Government of the United States, or in any Department or Officer thereof.

U.S. Const. art. III, § 2, cl. 1

The judicial Power shall extend to all Cases, in Law and Equity, arising under this Constitution, the Laws of the United States, and Treaties made, or which shall be made, under their Authority;—to all Cases affecting Ambassadors, other public Ministers and Consuls;—to all Cases of admiralty and maritime Jurisdiction;—to Controversies to which the United States shall be a Party;—to Controveries between two or more States;—between a State and Citizens of another State;—between Citizens of different States;—between Citizens of the same State claiming Lands under Grants of different States, and between a State, or the Citizens thereof, and foreign States, Citizens or Subjects.

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PETITION FOR A WRIT OF CERTIORARI TO THE NINTH DISTRICT COURT OF APPEALS OF THE STATE OF TEXAS AT BEAUMONT, TEXAS

STATEMENT OF THE CASE

Dau Van Tran died on September 16, 1985, as a result of an accident on the Sabine River at Port Arthur, Texas. Tran was climbing out of the water at dockside, apparently after trying to remove an obstruction from a shrimpboat's propeller, when a wave allegedly generated by a large ship sailing down-river pushed the shrimpboat against the dock. Tran was crushed between the boat and the dock.

Tran's Estate and his mother and father filed suit in Texas state court against the petitioning Texaco entities (hereinafter collectively Texaco), which owned and operated the ocean-going tanker TEXACO CALIFORNIA that allegedly caused the wave, and against the owner of the dock. The complaint (Appendix G) invoked the Texas wrongful death and survival statutes and the federal general maritime law, (App. G at 39a), but did not specify which body of law allegedly applied to which defendant.

After a bench trial, the judge entered findings of fact and conclusions of law (Appendix C) that exonerated the other defendants but found Texaco liable for negligently operating the vessel. The court awarded damages of $1,324,849.55, (App. C at 29a), of which $575,000 was specifically denominated as compensation for the parents' mental anguish. (App. C at 27a). The court adjusted the award for Tran's 15% negligence and for a settlement plaintiffs received from the shrimpboat owner, (App. C at 29a), then entered final judgment dated September 28, 1988, (Appendix D), for $1,103,622.12, plus prejudgment interest. (App. D at 32a).

Texaco moved to reform that judgment. (Appendix H). In a supporting memorandum, (Appendix I), Texaco argued that although state law may have applied to the plaintiffs' claims against the dock-owner, the federal general maritime law governed the claims against Texaco and pre-empted state law. (App. I at 49a-51a; 52a-57a). The choice of law determination was significant, because federal general maritime law does not permit recovery of damages for mental anguish, *Sea-Land Services, Inc. v. Gaudet*, 414 U.S. 573, 586 & n. 17, 94 S.Ct. 806, 815 & n. 17, 39 L.Ed.2d 9 (1974), and may not permit recovery of prejudgment interest. *Cf. Martin v. Walk, Haydel & Associates, Inc.*, 794 F.2d 209 (5th Cir. 1986). Texaco asked that the judgment be amended to conform to general maritime law, which would require, at a minimum, striking the sums awarded to Tran's parents as mental-anguish damages. (App. I at 51a-52a). The trial court failed to act on Texaco's motion, thereby denying the motion by operation of Texas law on December 12, 1988, 75 days after the original judgment was entered. Rule 329b(c), *Tex. R. Civ. P.*

Texaco appealed to the Ninth District Court of Appeals of Texas at Beaumont. The appellate court affirmed the trial court's judgment, (App. A, 777 S.W.2d 783), and held that regardless of whether the incident was a maritime tort, a Texas court could still apply the state wrongful-death act because the death occurred in territorial waters. (App. A at 17a, 777 S.W.2d at 790). The opinion also held that because Tran died at dockside, the case was not a maritime tort, and thus was not governed by the general maritime law. *Id.* Texaco appealed to the Texas Supreme Court on the same grounds, but that court did not grant discretionary review.

Texaco asks this Court to review the Texas state court's decision to apply Texas state law and award damages thereunder. As Texaco will show, the Texas state court should have applied general maritime law, because both policy and precedent require a holding that general maritime law pre-empts state law where maritime torts are involved. As Texaco will also show, the Texas court erred in holding that this case did not involve a maritime tort, because controlling federal law holds that negligent operation of a vessel on navigable waters is a maritime tort as a matter of law. Either or both of those alternative holdings impermissibly invaded an exclusively federal domain. Texaco asks this Court to vacate the judgment and remand the matter to the Texas state courts with orders to apply the federal general maritime law to the facts as found at trial, and to modify the judgment accordingly.

REASONS FOR GRANTING THE WRIT

In *Moragne v. States Marine Lines, Ltd.*, 398 U.S. 375, 90 S.Ct. 1772, 26 L.Ed.2d 339 (1970), this Court judicially created a federal cause of action under the general maritime law for wrongful deaths occurring in state territorial waters. Prior to *Moragne*, the general maritime law did not provide any right of action for wrongful death, although when a death occurred in territorial waters, claimants could recover under the law of the adjacent state. The question presented in this case is whether, after *Moragne*, a claimant suing in state court for a death occurring in territorial waters may recover only under the federal cause of action created in *Moragne*, or whether the plaintiff may recover under a state wrongful death statute.

Several federal appellate courts have held that after *Moragne*, federal rather than state law controls wrongful-death actions in territorial waters. *Nelson v. United States*, 639 F.2d 469 (9th Cir. 1980) ("The need for uniformity in maritime wrongful death actions requires extension of *Moragne* . . . to the exclusion of state wrongful death statutes"); *Matter of S/S HELENA*, 529 F.2d 744 (5th Cir. 1976) ("Because a persuasive rationale for the enforcement of state wrongful death statutes in admiralty courts no longer exists after *Moragne*, we hold that the wrongful death remedy provided by that case precludes recognition in admiralty of state statutes"); *Petition of United States Steel Corp.*, 436 F.2d 1256, 1279 (6th Cir. 1970) (*Moragne* changes rule that wrongful-death damages can be governed by state law, since creation of a federal wrongful-death remedy eliminates need for applying state law), *cert. denied*, 402 U.S. 987, 91 S.Ct. 1649; *reh'g denied* 403 U.S. 924, 403 U.S. 940, 91 S.Ct. 2247 (1971). *See also Lyon v. Ranger III*, 858 F.2d 22, 27 (1st Cir. 1988) (after *Moragne*, state law may serve the limited purpose of providing guidance to a federal court resolving an unsettled issue of maritime law).

When federal general maritime law applies, state law may not serve even the limited purpose of providing supplemental damages. This Court has squarely held that allowing state-law damages in addition to maritime-law damages impermissibly undermines the necessary uniformity of maritime law no matter whether the maritime measure of damages is established by Congress or by the judiciary. *Offshore Logistics, Inc. v. Tallentire*, 477 U.S. 207, 233, 106 S.Ct. 2485, 2500, 91 L.Ed.2d 174 (1986) (state-law remedies may not supplement remedies under

maritime wrongful-death statute); *Chelentis v. Luckenbach S.S. Co.*, 247 U.S. 372, 382, 38 S.Ct. 501, 503, 62 L.Ed. 1171 (1917) ("[N]o state has power to abolish the well-recognized maritime rule concerning measure of recovery and substitute therefor the full indemnity rule of the common law"); *see also Petition of United States Steel Corp.*, 436 F.2d 1256 (6th Cir. 1970) (damages in excess of those allowed under maritime law cannot be recovered under state law).

The Texas appellate court's alternative holding that Tran's death did not involve a maritime tort is patently incorrect. The trial court found that the producing cause of Tran's death was the negligent operation of the TEXACO CALIFORNIA on the Sabine River, a navigable waterway. Negligent operation of a vessel on navigable waters is a maritime tort as a matter of law. *See, e.g.*, Admiralty Extension Act of 1948, 46 U.S.C. § 740 ("The admiralty and maritime jurisdiction of the United States shall extend to and include all cases of damage or injury, to person or property, caused by a vessel on navigable water, notwithstanding that such damage or injury be done or consummated on land"); *Foremost Ins. Co. v. Richardson*, 457 U.S. 668, 674, 102 S.Ct. 2654, 2658, 73 L.Ed.2d 300 (1982) (construing negligent operation of vessel on navigable waters to be a maritime tort as a matter of law even though the vessel was not engaged in commercial activity); *Executive Jet Aviation, Inc. v. City of Cleveland*, 409 U.S. 249, 269-70, 93 S.Ct. 493, 505, 34 L.Ed.2d 454 (1972) (admiralty law regulates movement of vessels on navigable waters).

In making the foregoing errors, the state courts effectively ignored the federal interest in the development and uniform application of maritime law. The danger this precedent poses to the federal interest is heightened by the fact that Texas has recently opened its doors to the world's plaintiffs by holding that the doctrine of *forum non conveniens* is not part of Texas law. Thus, the state's courts can and must hear any case where the defendant is subject to personal jurisdiction, whether or not the case arose in Texas or had anything to do with Texas. *Alfaro v. Dow Chemical,* 33 Tex. S. Ct. J. 326 (March 28, 1990). If Texas is allowed to develop its own body of maritime wrongful-death law and apply that body of law as its courts deem proper, the Texas maritime law may grow to the point that it seriously threatens the primacy of federal maritime law.

The Texas appellate decision in the case at bar directly conflicts with the decisions of four Circuit Courts of Appeals. Moreover, the decision involves an important issue of federal law which has not been decided in a case such as this, where the plaintiff files the action in state court. The Texas decision conflicts with principles enunciated in numerous decisions of this Court. For those reasons, as set out in Rule 10.1(b) and (c) of this Court's Rules, and as set forth in more detail herein, this petition should be granted.

ARGUMENT

A. The Texas Court Erred In Holding That State Substantive Law Could Apply To A Death Occurring In Territorial Waters Caused By a Maritime Tort.

To understand why the appellate court's application of Texas law was error, we must examine the labored development of a remedy for a death occurring in state territorial waters.

1) State law was applied to maritime wrongful deaths only after this Court determined that federal law did not address wrongful death.

In *The Harrisburg*, 119 U.S. 199, 7 S.Ct. 140, 30 L.Ed. 358 (1886), this Court held that an action for wrongful death was purely statutory, and that because no federal statute addressed maritime wrongful death, the federal general maritime law did not provide a wrongful-death remedy. This holding meant that one who was injured in a maritime casualty could recover, but one who died had no remedy.

Both this Court and Congress acted to alleviate the harshness of that result. In *The Hamilton*, 207 U.S. 398, 28 S.Ct. 133, 52 L.Ed. 264 (1907), this Court held that a maritime claimant could recover under state wrongful death laws if those laws purported to reach the maritime *situs* of the death. In 1920, Congress enacted two statutes. The Death on the High Seas Act, 46 U.S.C. § 761 *et seq.*, provided a remedy for deaths occurring outside the state's territorial waters, and embraced this Court's decision in *The Hamilton* by preserving state remedies for deaths occurring within territorial waters.

46 U.S.C. § 767. The Jones Act, 46 U.S.C. § 688, allowed seamen to recover against their employers for negligence resulting in death irrespective of the *situs* of the death.

Those responses provided to everyone a remedy of sorts, but not necessarily a very satisfactory remedy. A seaman had his Jones Act remedy for death caused by negligence (but not unseaworthiness) no matter where the death occurred. Anyone killed outside state territorial waters had a remedy in the Death on the High Seas Act. Those killed in state territorial waters had their state-law remedies under *The Hamilton*.

2) Application of state law in death cases was an exception to the general maritime rules of uniformity and federal supremacy.

This Court's reference to state wrongful-death laws in *The Hamilton* stood in marked contrast to an important line of cases that limited state power over maritime matters, and stressed uniformity and federal supremacy.

In the seminal case of *Southern Pacific Co. v. Jensen*, 244 U.S. 205, 37 S.Ct. 524, 61 L.Ed. 1086 (1917), this Court held that New York's worker's compensation statute could not be applied to the death of a longshoreman. The Court said that the provisions of the New York statute requiring insurance, creating liability without fault and basing compensation on loss of earning power served to "work material prejudice to the characteristic features of the general maritime law" and to interfere "with the proper harmony and uniformity of that law in its international and interstate relations." *Id.* at 216, 37 S.Ct. at 529, 61 L.Ed. 1086.

In *Chelentis v. Luckenbach S.S. Co.*, 247 U.S. 372, 38 S.Ct. 501, 62 L.Ed. 1171 (1917), this Court held that a claimant was restricted to his maritime-law remedies rather than his more generous state-law remedies even where he brought suit in state court.

And in *Knickerbocker Ice Co. v. Stewart*, 253 U.S. 149, 40 S.Ct. 438, 64 L.Ed. 834 (1920), this Court invalidated a Congressional act that awarded waterfront workers their rights and remedies under state worker's compensation laws. This Court held that the impact of the amendment was to delegate to the states the exclusive authority of Congress to prescribe maritime rights and remedies, and that because such authority is non-delegable, the amendment was invalid. *Id.* at 164, 40 S.Ct. at 441, 64 L.Ed. 834. In so holding, this Court stressed the Constitutional requirement of federal primacy in maritime law arising out of the provision extending federal judicial power to "all cases of admiralty and maritime jurisdiction," U.S. Const. art. III, § 2, cl. 1, and the provision empowering Congress to pass laws "necessary and proper to carry out granted powers," U.S. Const. art. I, § 8, cl. 18. The Court read those grants of federal authority as directives to establish "harmonious and uniform rules applicable throughout every part of the Union." *Knickerbocker Ice Co., Id.* at 164, 40 S.Ct. at 441, 64 L.Ed. 834.

In *Jensen* and *Knickerbocker Ice*, this Court acknowledged that *The Hamilton* was inconsistent with the general rules of uniformity and federal supremacy in maritime matters, and was a narrow exception to those rules. *Jensen*, 244 U.S. at 216, 37 S.Ct. at 529, 61 L.Ed. 1086; *Knickerbocker Ice*, 253 U.S. at 166, 40 S.Ct. at 442, 64 L.Ed. 834.

3) This Court created a federal maritime law remedy for wrongful death.

With time, tension grew between the rule of maritime uniformity and federal supremacy on the one hand and a system that looked to state law as the remedy for maritime wrongful deaths on the other hand. Suppose, for example, that the injury at issue was caused by a breach of the warranty of seaworthiness. Did this mean that if the victim died instead of being injured, recovery depended upon whether the state wrongful-death statute encompassed the historic maritime concept of unseaworthiness? In *The Tungus v. Skovgaard,* 358 U.S. 588, 79 S.Ct. 503, 31 L.Ed.2d 524 (1959), this Court answered that question in the affirmative, declaring that when a maritime wrongful-death claimant invoked state law, he had to accept that law as a whole, complete with all limitations. The decision in *The Tungus* added new complexities to the problem of wrongful death in state territorial waters, and defeated uniformity altogether.

In 1970, this Court revisited the entire problem in *Moragne v. States Marine Lines, Ltd.,* 398 U.S. 375, 90 S.Ct. 1772, 26 L.Ed.2d 339 (1970). After reviewing the unsatisfactory judicial and congressional efforts to deal with wrongful deaths in territorial waters, this Court concluded that the root of the problem was its holding in *The Harrisburg* that wrongful-death actions could not be maintained absent a statute. This Court overruled *The Harrisburg,* and created a new cause of action based on the federal maritime common law for wrongful death in territorial waters. In so doing, the Court again stressed the importance of uniformity, saying:

> Our recognition of a right to recover for wrongful death under general maritime law will assure uniform vindication of federal policies, removing the tensions and discrepancies that have resulted from the necessity to accommodate state remedial statutes to exclusively maritime substantive concepts. [Citations omitted]. Such uniformity not only will further the concerns of both of the 1920 Acts but also will give effect to the constitutionally based principle that federal admiralty law should be 'a system of law coextensive with, and operating uniformly in, the whole country.'

Moragne, 398 U.S. at 401-02, 90 S.Ct. at 1788, 26 L.Ed. 2d 339. The question *Moragne* did not specifically answer, and which this case squarely poses, is whether that judicially created federal cause of action is the *exclusive* remedy for wrongful death in state territorial waters, or whether state wrongful-death statutes still have a role to play.

4) The rule of maritime uniformity outweighs any countervailing reasons that would permit application of state statutes to wrongful-death actions.

As we have seen, the application of state wrongful-death statutes in a maritime context was an exception to the general rule of maritime uniformity, and has been recognized as such. The issue of whether non-uniform state statutes still have a role to play in a maritime context depends upon the reason for their application as an exception to the uniformity rule.

(a) *Moragne* obviated the void-filling rationale for using state statutes.

This Court has articulated two reasons for applying state wrongful-death statutes despite the rule of maritime uniformity. The first reason was to fill the void in maritime law that arose when this Court held that maritime law did not recognize a cause of action for wrongful death. A typical explanation of the void-filling role of state law is found in *Romero v. International Terminal Operating Co.*, 358 U.S. 354, 373, 79 S.Ct. 468, 480-81, 3 L.Ed.2d 368 (1959), where this Court said:

> It is true that state law must yield to the needs of a uniform federal maritime law when this Court finds inroads on a harmonious system. But this limitation still leaves the states a wide scope. . . . State remedies for wrongful death and state statutes providing for the survival of actions, both historically absent from the relief offered by the admiralty, have been upheld when applied to maritime causes of action.

Moragne eliminated the void that the state statutes filled. So if state statutes had been invoked in maritime cases solely to fill the pre-*Moragne* void in maritime law, those statutes would have no place in a post-*Moragne* world, and the rule of maritime uniformity ought to control.

Plaintiffs suggested in their brief to the Texas Supreme Court that *Moragne* had only filled the void in maritime law for causes of action based on unseaworthiness, but that it did not address claims based on negligence. Plaintiffs asserted that *The Tungus* still permits application of state law to negligence claims. However, the courts that have explicitly considered that issue have disagreed with the plaintiffs' position and have interpreted *Moragne* as

providing a uniform maritime remedy for death caused either by negligence or unseaworthiness. *See Nelson v. United States*, 639 F.2d 469, 473 (9th Cir. 1980); *Matter of S/S HELENA*, 529 F.2d 744 (5th Cir. 1976). So although *Moragne* may not have explicitly overruled *The Tungus*, it did render *The Tungus* obsolete.

(b) The states' sovereignty interests in applying their death statutes have never outweighed the maritime rule of uniformity.

The second reason for recognizing state wrongful-death statutes as exceptions to the rule of maritime uniformity was the notion that states may govern their own territorial waters until and unless such self-governance collides with the need for national uniformity. In *Just v. Chambers*, 312 U.S. 383, 391, 61 S.Ct. 687, 693, 85 L.Ed. 903 (1941), this Court alluded to that sovereignty interest when it called admiralty's cognizance of state wrongful-death statutes "a broad recognition of the authority of the States to create rights and liabilities with respect to conduct within their borders when the state action does not run counter to federal laws or the essential features of an exclusive federal jurisdiction."

If a state court's power to apply its own wrongful-death law in territorial waters were justified as an attribute of state sovereignty, then *Moragne* would not control, since it does not undermine the sovereignty justification for applying state law. However, as *Just* recognized, the sovereignty interest ends where state law collides with "the essential features" of maritime law. And whenever the question has presented itself, this Court has declared

that stacking state-created remedies atop federally recognized remedies is just such a collision with an "essential feature" of maritime law. *See, e.g., Offshore Logistics v. Tallentire*, 477 U.S. 207, 106 S.Ct. 2485, 91 L.Ed.2d 174 (1986) (state wrongful-death remedies cannot be used to supplement remedies provided by Death on the High Seas Act for death occurring beyond state territorial waters); *Chelentis v. Luckenbach S.S. Co.*, 247 U.S. 372, 382, 38 S.Ct. 501, 503, 62 L.Ed. 1171 (1917) ("[N]o state has power to abolish the well-recognized maritime rule concerning measure of recovery and substitute therefor the full indemnity rule of the common law"). Unless this Court is prepared to abandon *Chelentis*, the general rule of maritime uniformity must take precedence over any interest Texas may have in applying its own wrongful-death law in its own territorial waters.

The Texas appellate court herein noted section 7 of the Death on the High Seas Act, which says:

> The provisions of any State statute giving or regulating rights of action or remedies for death shall not be affected by this chapter. Nor shall this chapter apply to the Great Lakes or to any waters within the territorial limits of any State . . .

46 U.S.C. § 767. Although that statute does not directly address this case, which does not involve death on the high seas, the Texas appellate court thought it had discerned in section 7 a congressional endorsement of the state's sovereignty interests. App. A at 16a, 777 S.W.2d at 790. In *Moragne*, this Court considered at length the argument that section 7 preserved the state's power over territorial waters as an attribute of sovereignty. The Court rejected that sovereignty argument, and held that section

7 was meant only to preserve the void-filling function that state law served at the time section 7 was enacted. *Moragne v. States Marine Lines, Inc.*, 398 U.S. 375, 395-405, 90 S.Ct. 1772, 1785-89, 26 L.Ed.2d 339. This Court has reaffirmed that interpretation of section 7 on other occasions. *See, e.g., Offshore Logistics, Inc. v. Tallentire*, 477 U.S. 207, 228, 106 S.Ct. 2485, 2497, 91 L.Ed.2d 174 (1986) (DOHSA reference to state-court jurisdiction refers only to power of state court to hear action, "not the legislative ability to supply a different standard of recovery"); *Mobil Oil Corp. v. Higginbotham*, 436 U.S. 618, 622, 98 S.Ct. 2010, 2013, 56 L.Ed.2d 581 (1978) (section 7 enacted to prevent DOHSA from abrogating pre-*Moragne* state-law remedies for death in territorial waters).

5) Those appellate courts that have considered the question have concluded that after *Moragne*, federal rather than state law applies to maritime wrongful deaths in state territorial waters.

As we previously pointed out, the circuit courts have decided that *Moragne* completely eliminated state-law causes of action for deaths in territorial waters. *Lyon v. Ranger III*, 858 F.2d 22, 27 (1st Cir. 1988); *Nelson v. United States*, 639 F.2d 469 (9th Cir. 1980); *Matter of S/S Helena*, 529 F.2d 744 (5th Cir. 1976); *Petition of United States Steel Corp.*, 436 F.2d 1256, 1279 (6th Cir. 1970), *cert. denied* 402 U.S. 987, 91 S.Ct. 1649; *reh'g denied* 403 U.S. 924, 403 U.S. 940, 91 S.Ct. 2247 (1971). In the *Helena*, the court specifically addressed both the void-filling and state-sovereignty justifications

for the prior reliance on state law. With respect to void-filling, the court said that *Moragne* "filled this void and terminated this need for recognition of the state statutes." 529 F.2d at 752. With respect to state sovereignty, the court read *Moragne* as subordinating state sovereignty interests to the national interest in maritime uniformity.

In the foregoing cases, the plaintiff invoked the federal court's admiralty jurisdiction, whereas here, the plaintiff sued in state court. That difference, however, is not dispositive. Federal law gives to the federal courts complete and exclusive jurisdiction over martime matters in the first instance by virtue of 28 U.S.C. § 1333, which declares:

> The district courts shall have original jurisdiction, exclusive of the courts of the States, of:
>
> (1) Any civil case of admiralty or maritime jurisdiction . . .

The statute then relinquishes some of that exclusive jurisdiction back to the state courts by "saving to suitors in all cases all other remedies to which they are otherwise entitled," 28 U.S.C. § 1333(1). Thus, state courts have no inherent power over maritime matters, but exercise only the powers "saved" to them by federal law. That federal law, in turn, can limit and condition the state court's exercise of power over maritime matters.

An unbroken line of cases from this Court holds that when claimants bring their admiralty or maritime matters in state court (or on the "law side" of federal court if diversity jurisdiction exists), federal rather than state substantive law applies. In *Offshore Logistics, Inc. v.*

Tallentire, 477 U.S. 207, 222-23, 106 S.Ct. 2485, 2494, 91 L.Ed.2d 174 (1986), this Court said:

> [T]he "savings to suitors" clause allows state courts to entertain *in personam* maritime causes of action, but in such cases the extent to which state law may be used to remedy maritime injuries is constrained by the so-called "reverse-*Erie*" doctrine which requires that the substantive remedies afforded by the States conform to governing federal maritime standards.

See also, e.g., Kermerac v. Compagnie Generale Transatlantique, 358 U.S. 626, 79 S.Ct. 406, 3 L.Ed.2d 550 (1959) (non-seaman's suit for injury aboard berthed ship governed by maritime law, not state law, no matter whether suit filed in federal or state court); *Chelentis v. Luckenbach S.S. Co.*, 247 U.S. 372, 384, 38 S.Ct. 501, 504, 62 L.Ed. 1171 (1917) ("without regard to the court where he might ask relief, petitioner's rights were those recognized by the law of the sea"). Thus, if federal law pre-empts state law in wrongful-death actions brought under federal admiralty jurisdiction, as the post-*Moragne* cases hold, federal law also pre-empts state law when such cases are brought in state court.

The Texas appellate court misread the meaning of the "savings to suitors" clause. It suggested that the clause empowers state courts to "follow their own notions about this [maritime] field of law," App. A at 16a-17a, 777 S.W.2d at 790. As we have seen, though, the "savings" clause only empowers state courts to entertain maritime actions. When they do, they still must apply federal law rather than "follow their own notions" about maritime matters.

B. The Texas Court Mis-Applied Controlling And Important Federal Law When It Ruled That Tran's Death Did Not Involve A Maritime Tort.

In addition to erroneously holding that the Texas state wrongful-death act could apply to a death that occurred in state territorial waters, the appellate court erroneously held that the incident was not a maritime tort. App. A at 17a, 777 S.W.2d at 790. The court noted that "the actual death-producing trauma was experienced on or at the dock," which it called "an extension of the land," App. A at 12a-13a, 777 S.W.2d at 788-89. The appellate court, apparently focusing on Tran's activities at the time of the accident, found that the negligence at issue had "no significant relationship" to traditional maritime activity, App. A at 17a, 777 S.W.2d at 790. The court declared that "because of the locale of the injury," and because of "the lack of impact on general maritime commerce and navigation," the facts "as found by the trial bench do not constitute a maritime tort." *Id.*

That holding conflicts fatally with federal law. In the classic case of *Executive Jet Aviation, Inc. v. City of Cleveland,* 409 U.S. 249, 268, 93 S.Ct. 493, 504, 34 L.Ed.2d 454 (1972), this Court enunciated a two-prong test of maritime jurisdiction, and held that a maritime tort is one that not only occurs at a maritime locality, but that bears "a significant relationship to traditional maritime activity." That two-prong test was designed to insure that maritime jurisdiction did not expand beyond the substantive contours of admiralty law. The Court described admiralty law as "rules that govern the manner and direction those vessels may rightly move upon the waters," *Id.* at 269-70, 93 S.Ct. at 505, 34 L.Ed.2d 454.

In our case, the trial court found that the producing cause of the accident in question was the wrongful manner in which the vessel TEXACO CALIFORNIA moved upon the navigable waters of the Sabine River. This, then, is a classic "maritime tort" squarely governed by maritime law. *See also Foremost Ins. Co. v. Richardson*, 457 U.S. 668, 674, 102 S.Ct. 2654, 2658, 73 L.Ed. 2d 300 (1982) (negligent operation of vessel on navigable waters maritime tort as a matter of law even if operation not commercial).

Federal statutory law also places allegedly negligent operation of a vessel squarely within the ambit of maritime jurisdiction. The Admiralty Extension Act of 1948 provides:

> The admiralty and maritime jurisdiction of the United States shall extend to and include all cases of damage or injury, to person or property, caused by a vessel on navigable water, notwithstanding that such damage or injury be done or consummated on land.

46 U.S.C. § 740. So Congress, like this Court, has declared that injuries caused by vessels operating on navigable waters are maritime in nature.

The appellate court's statement that this incident was not a maritime tort was no mere fact-finding error. The opinion states, "we decide that the governing, ultimate facts, as found by the trial bench, do not constitute a maritime tort," App. A at 17a, 777 S.W.2d at 790. By applying its view of the law to the facts as found at trial, the appellate court plainly intended to hold that if an injury is felt on or near land, the matter is not a maritime

tort even though the producing cause of the injury is specifically found to be the negligent operation of a commercial vessel on navigable waters. That holding conflicts with the controlling pronouncements from Congress and this Court cited previously. Because the holding usurps the traditional core of federal admiralty and maritime jurisdiction, the matter is sufficiently important to warrant review by way of certiorari.

C. If Texas Is Allowed To Apply Its Own Body Of Laws To Wrongful Death In Territorial Waters, The Effects Will Extend Far Beyond Texas.

The Texas appellate court decision would be troublesome enough if it were merely a precedent for application of Texas state law to wrongful deaths occurring in Texas territorial waters. But the effects of the decision could be much more far-reaching.

In *Dow Chemical Co. v. Alfaro,* 33 Tex. S. Ct. J. 326 (March 28, 1990), the Texas Supreme Court held that Texas does not recognize the doctrine of *forum non conveniens,* and that therefore, a claimant may sue in Texas for death or injury occurring anywhere in the world so long as Texas can assert personal jurisdiction over the defendant. When such a suit is brought, the courts do not mechanically apply the substantive law of the place of the wrong or injury, but are to apply "the rules of substantive law that are appropriate under the facts of the case," *Id.* 33 Tex. S. Ct. J. at 327, quoting Tex. Civ. Prac. & Rem. Code Ann. § 71.031(c) (Vernon 1986).

The Fifth Circuit has expressed alarm over the problems Texas could cause if its courts failed to recognize *forum*

non conveniens in the maritime context. In *Exxon Corp. v. Chick Kam Choo*, 817 F.2d 307, 324 (5th Cir. 1987), *rev'd on other grounds*, 486 U.S. 140, 108 S.Ct. 1684, 100 L.Ed.2d 127 (1988), that court enjoined a Texas state court from hearing a maritime death case that the federal courts had already dismissed on *forum non conveniens* grounds. At that time, before *Alfaro*, Texas had not squarely decided whether it would or would not recognize the doctrine of *forum non conveniens*, but the mere possibility that Texas might refuse to recognize the doctrine was enough to persuade the Fifth Circuit to affirm an injunction against state proceedings. After discussing the various anomalies that could arise if Texas state courts heard maritime cases from around the world, the Fifth Circuit said, "We cannot tolerate this pointless intrusion on the basic uniformity of the maritime law." *Id.* 817 F.2d at 321.

This Court reversed, but on the narrow grounds that the federal courts had improperly enjoined a pending state proceeding, *Chick Kam Choo v. Exxon Corp.*, 486 U.S. 140, 108 S.Ct. 1684, 100 L.Ed.2d 127 (1988). However, this Court did not reach the question of whether Texas could apply its open-forum law in a maritime context, or whether federal *forum non conveniens* rules pre-empted state law. Rather, this Court said that the pre-emption issue was one for the state courts to decide in the first instance.

In our case, the issue of whether federal general maritime law pre-empts Texas state law is presented in a different context. Here, Texas has decided that its own wrongful-death law can apply in territorial waters. That threat to the characteristic uniformity of maritime law is heightened by Texas's declaration that it will hear any

case in which it can exercise personal jurisdiction over the defendant. The holding in our case, combined with the holding in the recent *Alfaro* case, create exactly the kind of "intolerable, pointless intrusion" into maritime uniformity that the Fifth Circuit foresaw in the *Chick Kam Choo* case.

D. The Texas Court Did Not Decide This Matter On An Adequate And Independent State Ground.

Prior to discussing and resolving the maritime-law issues, the Texas court said that if Texaco believed maritime law applied, it "should have pleaded that Dau Van Tran was a seaman" as an affirmative defense, and "should have pleaded facts invoking the general maritime law, or general admiralty law." App. A at 13a, 777 S.W. 2d at 789. Despite what plaintiffs may argue, those statements cannot rise to the level of adequate and independent state grounds on which to sustain the judgment without considering the significant issues of national importance that this case raises.

A close reading of the opinion, and examination of Texas law, shows that the appellate court's statements were merely advisory to future litigants. Nowhere does the appellate court say that Texaco waived its contention that maritime law applied. Indeed, the court's detailed discussion of the merits of the maritime issues and the specific holdings on those issues show that the court ruled on the merits, not on the basis of a pleadings defect. App. A at 17a, 777 S.W.2d at 790.

Basic principles of Texas pleading practice support the lower court's obvious determination that Texaco's failure to plead application of the general maritime law was not

a waiver of its contention that maritime law governed the claims against it.

First, any pleading defect is waived unless the party later relying on the defect makes a proper objection. *Cactus Drilling Corp. v. Hager*, 487 S.W.2d 758 (Tex. Ct. App.—El Paso, 1972, no writ); Rule 90, *Tex. R. Civ. P.* Plaintiffs did not object at trial to Texaco's contentions that the general maritime law applied. To the contrary, plaintiffs themselves pleaded:

> In addition, Plaintiffs allege that the decedent was a Jones Act seaman, and is entitled to recover not only for violation of the Jones Act but also under general maritime law.

(App. G at 39a). Then when Texaco filed its post-trial motion to reform the judgment to delete certain items of damage, plaintiffs did not complain that Texaco had failed to plead application of the general maritime law. Rather, plaintiffs responded by filing a Motion to Amend Findings of Fact, (Appendix K at 62a-63a), in which they sought increased damages for loss of companionship, affection and society should maritime law be applied and damages for mental anguish stricken.

Second, Texas law holds that an omission in pleadings, including a failure to plead an affirmative defense, is cured if the omitted issue is raised in the pleadings of another party, because the other party's pleadings provide notice that the issue will be tried. *Land Title Co. of Dallas, Inc. v. F.M. Stigler, Inc.*, 609 S.W.2d 754 (Tex. 1980). Since plaintiffs themselves pled application of the general maritime law, there was no need for Texaco to do so.

Because the Texas appellate court did not hold that Texaco had waived its contentions concerning application

of the general maritime law, the comments concerning pleading cannot be construed as an "adequate" state-law basis for the decision.

Nor can the appellate court's decision be construed as "independent" of federal law. The appellate court said that it was Texaco's "basic position" that Tran was a seaman, App. A at 12a, 777 S.W.2d at 788, suggesting that the court viewed seaman status as triggering application of maritime law. It is not and was not Texaco's position that Tran was a seaman, nor is seaman status a necessary predicate to invoking the general maritime law. *See, e.g., Kermerac v. Compagnie Generale Transatlantique,* 358 U.S. 625, 79 S.Ct. 406, 3 L.Ed.2d 550 (1979) (non-seaman's injuries aboard berthed vessel governed by maritime law, not state law). So the appellate court's observations about what Texaco might have pled reflect a misunderstanding of federal law. When a lower court's procedural ruling depends on an antecedent question of federal law that is intermixed with the merits of the case, review by this Court is proper. *International Longshoremen's Ass'n, AFL-CIO v. Davis,* 476 U.S. 380, 106 S.Ct. 1904, 90 L.Ed.2d 389 (1986); *Ake v. Oklahoma,* 470 U.S. 68, 105 S.Ct. 1087, 84 L.Ed.2d 53 (1985).

The question of whether the state-court decision rested on adequate and independent state grounds is itself a federal question. *Michigan v. Long,* 463 U.S. 1032, 103 S.Ct. 3469, 77 L.Ed.2d 1201 (1983). As the foregoing discussion shows, the Texas appellate court's advisory suggestions about pleadings do not constitute adequate or independent state grounds for decision, and this Court is free to address the merits of the state court's decision.

CONCLUSION AND PRAYER FOR RELIEF

As Texaco has argued, the Texas appellate court's application of the state wrongful-death act to the maritime tort at issue in this case was error, since the case should have been decided according to the rules and principles of the federal general maritime law. That law, among other things, forbids recovery of damages for mental anguish and may bar recovery of prejudgment interest. Texaco respectfully prays for an order of this Court remanding the matter to the Texas state courts with instructions to apply the federal general maritime law to the facts as found by the trial court, and to make all adjustments necessary to conform the judgment to the federal general maritime law.

Respectfully submitted,

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APPENDIX

APPENDIX A

COURT OF APPEALS
NINTH DISTRICT OF THE STATE OF TEXAS
1001 Pearl, Suite 330
Beaumont, Texas 77701

Shirley Forrest,
Clerk

Judgment entered August 31, 1989

No. 09-89-009 CV

Texaco Refining & Marketing, Inc., et al

vs.

Estate of Dau Van Tran, et al

Appealed from the 60th District Court of
Jefferson County, Texas

Opinion by Justice Jack Brookshire

This cause came on to be heard on the transcript of the record, and the same being inspected, because it is the opinion of this Court that there was no error in the judgment; it is therefore considered, adjudged and ordered that the judgment of the Court below be in all things affirmed and that all costs of the appeal be assessed against the appellants, Texaco Refining & Marketing, Inc. and Texaco Marine Services, Inc. A copy of this judgment shall be certified below for observance.

A true copy of the judgment, to be entered, I hereby certify.

/s/ SHIRLEY FORREST
Shirley Forrest,
Clerk

TEXACO REFINING & MARKETING, INC.,
and Texaco Marine Services, Inc.,
Appellants,

v.

ESTATE OF Dau Van TRAN, Vi Thi Pham, Do Van Tran, Farmer Boy's Catfish Kitchens International, Inc., Theresa Nguyen and Anh Nguyen,
Appellees.

No. 09-89-009-CV.

Court of Appeals of Texas,
Beaumont.

Aug. 31, 1989.

OPINION

BROOKSHIRE, Justice.

Originally, the Appellees, Vi Thi Pham and Do Van Tran, brought this cause of action based, primarily, on negligence and gross neglect, to recover their damages and injuries arising out of the death of Dau Van Tran. Dau was their son. He died on September 16, 1985. The pleadings alleged that Dau was crushed to his death between a shrimp boat and a dock or dock barge.

The litigation was initiated against the Texaco Refining & Marketing, Inc. (TRMI) and Texaco Marine Services, Inc. (TMSI). TRMI and TMSI were said to be the owners and operators of a certain seagoing vessel named TEXACO CALIFORNIA. Farmer Boy's Catfish Kitchens International, Inc. (Farmer Boy's) was a party-defendant, being the alleged owner of the dock at which the fishing trawler was tied up.

TRMI and TMSI filed a third-party action against Theresa Thi Nguyen and Anh Nguyen, the owners of the trawler, MISS MARY, on the theories of contribution and indemnity and maintaining that the Nguyens were directly responsible to Pham and Tran. A trial followed without the intervention of a jury. There were numerous Findings of Fact and separate Conclusions of Law. Judgment was cast against TRMI and TMSI, including some limited, prejudgment interest and post-judgment interest. No punitive damages were awarded. TRMI and TMSI failed in their action over and against Farmer Boy's. Several post-judgment motions were filed. TRMI and TMSI did not prevail in any of these motions. This appeal timely followed.

In a well-briefed and scholarly-presented point of error, the Appellants charge that there is no evidence to support the finding of the Bench and the judgment thereon relative to the Appellants' negligence and its proximate causation of any damages. Their argument is that any conceivable liability (either negligence or proximate causation) is based solely on the opinion testimony of experts proffered by the plaintiffs below (Pham and Tran). The Appellants state that the testimony of these experts relies upon hearsay with absolutely no independent evidence of

numerous, vital facts. Texas Rules of Civil Evidence, it was acknowledged, had become fully effective on September 1, 1983. *TEX. R. CIV. EVID. 701,* to and including *705,* delineated a significant departure from the previous rules of the admissibility of evidence and of the opinion testimony of experts.

TEX. R. CIV. EVID. 702 permits scientific, technical or other specialized knowledge which will assist the trier of fact to understand the evidence or to resolve a fact that is in issue. Then, a witness, who is qualified as an expert by either knowledge, skill or experience, may testify thereto "in the form of an opinion or otherwise". Independent of *Rule 702* is *Rule 703,* authorizing an expert to base his opinion on facts or data made known to that expert at the trial or before the trial. The expert may base an opinion, or an inference, on facts or data perceived by the expert or made known to him. Significantly, if the facts or data are of a type that are reasonably relied upon by the experts in the particular field involved in forming their expert opinions or inferences upon the particular subject matters; then the facts or data, themselves, need not be admissible.

TEX. R. CIV. EVID. 704 was certainly a significant, if not a revolutionary, change. *Rule 704* dramatically stated:

> "Testimony in the form of an opinion or inference otherwise admissible is not objectionable because it embraces an ultimate issue to be decided by the trier of fact."

And, of course, *TEX. R. CIV. EVID. 705* has importance here in that it permits an expert to testify as to

his opinions, as to his inferences, and give his reasons therefor without a prior disclosure of the underlying facts or data, subject to the trial bench's discretionary rulings.

The father and mother of Dau Van Tran maintain that a large wave, of considerable force and height, was caused by the passage of the tanker, TEXACO CALIFORNIA. They pleaded that the speed of the TEXACO CALIFORNIA was excessive and the excessive speed caused the wave and proximately caused the death of Dau Van Tran, their oldest son.

There was a witness fairly near the scene of the tragedy at the time, one William Cooner. Cooner testified that he saw a large wave come up on the shore. The wave washed 120 to 130 feet inland. He further stated that he did not see any vessel, however, which might have caused that wave. Mr. Cooner stated that the wave he testified about was the largest surge, or largest wave, he had ever witnessed. He further swore that not seeing a vessel was not unusual because, by the time the wave, wake or surge gets to the dock or the shore, the distance traveled by the large wave is so great that the vessel causing the same would be down past a certain public park and could not be seen that far off.

Extensive pretrial discovery was developed. Each side, in the discovery process, exhibited thoroughness, diligence and detailed attention to the fact issues to be tried. To one set of interrogatories, the Appellants answered that, on or about September 16, 1985, the vessel, TEXACO CALIFORNIA, did pass the Fisherman's Reef barge dock, located in Sabine Pass, in Jefferson County. This dock was owned or leased by Farmer Boy's. This was an answer made by Texaco Refining and Marketing, Inc., the

owner at the time in question of the seagoing tanker. These answers were sworn to by the affiant who made oath that he had personal knowledge of these facts. His sworn affidavit was dated October 27th, 1987. Is is correct that, later, this answer was changed. It is interesting to note that the very question was asked in previous federal court interrogatories. It was previously answered "Yes". The litigation had been originally filed in the United States District Court. Apparently, the Defendants/Appellees impleaded a third-party defendant, which was a Texas corporation.

The decedent's probate estate was open and pending in the Jefferson County Probate Court and, in view of the nature of the parties' citizenships, the federal court case was non-suited and the case refiled in the state court.

Certain responses made to the interrogatories stated that TRMI admitted that the TEXACO CALIFORNIA made speed of about 8.8 knots from buoy 47 to buoy 40, then approximately 11.3 knots from buoy 40 to buoy 38 and, later, 9.7 knots from buoy 38 to buoy 32. Mr. Owens, a maritime expert, testified that he confirmed these various speeds by checking the distances and the times involved. Owens stated the speeds were also documented in the Deck Log and Bell Sheets of the vessel. Owens also further swore that the average transit speed of the tanker was 9½ knots. It is sufficient to state that the experts put on the stand by the Plaintiffs/Appellees swore that the seagoing tanker was not practicing good seamanship. One expert characterized these speeds as "barreling down". The expert further testified that the TEXACO CALIFORNIA was negligent in its speed and its seamanship;

that is, the good seamanship that she, the vessel, failed to employ. We find, in the record:

> "Q In other words, it was negligent in several different areas?
>
> "A Yes, I do. Certainly Scott and the Skipper should have been able to appraise this area. They have been through there enough. That's a total disregard for the rights of others moored along in there.
>
> "Q As a matter of fact, I was going to ask you if you had an opinion as to whether or not their conduct on this particular occasion constituted gross negligence if we assume that gross negligence is the entire want of care which would raise the belief that the acts or omissions complained of was the result of a conscience indifference to the rights or welfare of the person or persons to be affected by it?
>
> "A Yeah. I figure that's gross negligent [sic] on their part, yes, I do.

Mr. Cooner was looking in the correct direction when he saw a large wave come upon the beach and roll back upon and beyond the shoreline to a depth of about 120 feet to 140 feet. This large wave, or surge, occurred sometime around 2:00 or 2:30 P.M. On September 16, 1985, the TEXACO CALIFORNIA took her pilot aboard at 1304. Her last line was off at 1326.

The record reflects that the TEXACO CALIFORNIA passed buoy 47 at 1353 hours on September 16, 1985. At buoy 47, the record reflects that the vessel was traveling 8.8 knots but that its minimum steerageway speed was estimated at 2½ to 3 knots. The time of the large wave, or surge, is compatible with the time of the death of Dau Van Tran.

A second expert, placed on the stand by Tran and Pham, a Mr. Roger L. Owens, expressed an opinion based on information he had, plus his research, calculations and on-site inspections. He said the cause of the accident made the basis of this suit was:

> "A . . . [J]ust excessive speed of a very large loaded vessel transiting the Canal."

Further, Mr. Owens used a definition of gross negligence as being "that entire want of care which would raise the belief that the act or omission complained of was a result of a conscious indifference to the right or welfare of a person or persons to be affected by it", and Owens, reaffirming that he understood the definition, was asked if he had an opinion as to whether or not the TEXACO CALIFORNIA was grossly negligent. His answer was:

> "A Yes, because the Master was grossly negligent."

Other evidence of probative force exists in the record, which was admissible as opinions and inferences of the experts under *TEX. R. CIV. EVID. 702, 703, 704* and *705*. This was a bench trial where an experienced district judge could properly weigh the testimony of the witnesses and assess the credibility that the testimony merited. A presumption exists that the judge considered only proper evidence.

Upon analysis, and upon applying the accepted standards for appellate review, we overrule the Appellants' first point of error. *Garza v. Alviar*, 395 S.W.2d 821 (Tex. 1965); *In re King's Estate*, 150 Tex. 662, 244

S.W.2d 660 (1951); R. Calvert, "*'No Evidence' and 'Insufficient Evidence' Points of Error*", 38 TEXAS L. REV. 361 (1960). Compellingly similar standards govern bench trials.

Appellants' Point of Error II is:

> "There is no evidence of record to support the award of survival damages."

An ambulance service received an emergency call at about 1425 hours on September 16, 1985. The ambulance arrived in Sabine Pass at 1447 hours, picked up Dau Van Tran, and left Sabine Pass at 1502 hours and arrived at the hospital in Port Arthur at 1523 hours. There exists a narrative account of the medical assistance that was afforded to Dau Van Tran by the Diamond Emergency Medical Services.

In addition, a witness, who qualified as an expert, named Captain Robert J. Underhill, testified that the MISS MARY was pulled out, fetched back on her lines and then came slamming back in because of the large wave. When the MISS MARY came slamming back in, according to the expert, it slammed Dau Van Tran between its side and the dock barge. This was described as a pretty violent blow to the body of Dau, the violent blow resulting from the excessive speed of the TEXACO CALIFORNIA, and from nothing else, according to Captain Underwood. His testimony was that the young man was still conscious after the incident took place and that Dau had been moaning and uttering groans. Dau was alive when he left the scene of the occurrence and the record reflects that Dau survived for at least 35 to 40 minutes. We conclude that there was sufficient evidence

to support the Bench's finding that Dau suffered conscious pain and conscious suffering for about 35 to 40 minutes. The award for this element of damages was not excessive. For example, in *Gulf States Utilities Co. v. Reed*, 659 S.W.2d 849 (Tex. App.—Houston [14th Dist.] 1983, writ ref'd n.r.e.), an award was made in the amount of $10,000. to a mother for the pain and suffering of her son. The pain and suffering had a duration of approximately 5 seconds.

In another, somewhat parallel and persuasive, case, a citizen of the United States of Mexico recovered $175,000. for conscious pain and suffering during an undetermined amount of time. That case is *Levinge Corp. v. Ledezma*, 752 S.W.2d 641 (Tex. App.—Houston [1st Dist.] 1988, no writ). In that situation, the employer's accident report revealed that the time of injury was about 3:05 p.m. The arrival of the injured person at the emergency room occurred about 3:30 p.m., the death occurring at 3:43 p.m. A fellow worker saw the deceased fall from a pickup truck, hit the ground and bounce and jerk. The witness testified that the man's eyes were open and he was coughing and gasping for air and that blood was spurting forth from his mouth in a steady emission. The deceased was trying to expectorate it. The Houston Court of Appeals declined to substitute its own judgment for that of the trier of the facts, stating that it could only do so if the record clearly indicated that the award was based upon passion, prejudice, improper motive or was so excessive as to actually shock the conscience of the jurists. We do not find these passions and improper motives here. *See and compare K-Mart Apparel Fashions Corp. v. Ramsey*, 695 S.W.2d 243 (Tex. App.—Houston [1st Dist.] 1985, writ ref'd n.r.e.).

Nextly, the Appellants advance that prejudicial error was committed when the trial court sustained the objections of the Appellees to the testimony of the Appellants' designated expert witnesses. The designation by the Appellants of their expert witnesses was made somewhat less than 30 days prior to the start of the trial on the merits.

The significant facts are that, on two occasions prior to the late letter adding the Appellants' two experts, Gilbert and Horne, the Appellants had answered "unknown at present" when the Plaintiffs/Appellees attempted to ascertain the identity of all the expert witnesses to be proffered by the Appellants. The Appellants have simply failed to meet their burden of good cause in the sense that they have failed to convince the trial bench that their late designation of the two experts was reasonable. The recent trend of the decisions on the discovery rules is that the imposition of either penalties or sanctions for the failure, delay or refusal of a party to comply with discovery rules rests within the sound discretion of the trial court. The trial court has the burden of seeing to it that the discovery rules are followed after having been clearly mandated by our Supreme Court. The trial court also has the burden, to a great extent, to see that the case is properly prepared for an adequate and truth-seeking trial on the merits. The decisions reached by the district bench, in an attempt to obtain compliance with the discovery rules, cannot be reversed unless the appellate court determines that the trial bench abused its discretion as a matter of law. We simply cannot make such a finding under this record. *Alexander v. Barlow*, 671 S.W.2d 531 (Tex. App.—Houston [1st Dist.] 1983, writ ref'd n.r.e.); *Jarrett v. Warhola*, 695 S.W.2d 8 (Tex. App.—Houston [14th Dist.] 1985, writ ref'd).

The Appellants' brief next advances that it was error to award damages for past and future mental anguish; and that it was clearly error for the trial court to award prejudgment interest thereon. *See and compare Moore v. Lillebo*, 722 S.W.2d 683 (Tex. 1986); *Clifton v. Southern Pacific Transp. Co.*, 709 S.W.2d 636 (Tex. 1986).

The basic position taken by the Appellants is that the deceased, Dau Van Tran, was a seaman and Dau was injured and met his death on navigable waters and, therefore, the general maritime law should not only control but be the exclusive law applicable. Under the general maritime law, the Appellants argue that any damages for mental pain or mental anguish, or any interest, should be entirely disallowed. However, as a defensive matter, it was never pleaded that Dau was a seaman. The court did not find that Dau was a seaman.

The Appellants' live pleadings was their Original Answer which set up, generally, the defenses of contributory negligence, negligence of third party, assumption of risk and unavoidable accident. It is not shown in the record that Dau was a seaman. The record reflects that he worked for himself and that he was in the nature of a volunteer when attempting to help out an older man who was the Captain of the MISS MARY by retrieving or relieving some sort of an object from around or near the propeller. The record shows that he was not being paid by anyone and that he volunteered to help a much older man, a Mr. Yen Nguyen. There is ample evidence of probative force that, as a result of the large wave and surge, that protruded upon the land 120 feet to 130 feet, or more, the MISS MARY was pulled out, fetched up on her lines and then slammed back in against the dock barge. There

is evidence that Dau was against the dock barge between two tires and the slamming back in of MISS MARY was strong enough to squash the two tires and Dau Van Tran as well. Therefore, the actual death-producing trauma or injury was experienced on or at the dock. Such a dock, or barge dock, has been recognized as an extension of the land. From the record, it was shown that death occurred within the State territorial waters.

It is clear, in the present case, that the Appellees sought to obtain a judgment against the Appellants based on the theory of negligence under the Texas Wrongful Death Statute. *TEX. CIV. PRAC. & REM. CODE ANN. Secs. 71.001-71.002* (Vernon 1986), and the Texas Survival Statute *TEX. CIV. PRAC. & REM. CODE ANN. Sec. 71.021* (Vernon 1986). The Appellees did not plead for relief under the doctrine of unseaworthiness. They did not invoke the maritime law.

As the points were presented and argued on appeal, we conclude that the Appellants should have pleaded that Dau Van Tran was a seaman. They should have pleaded facts invoking the general maritime law, or general admiralty law. Appellants' pleadings do not exclude the Texas Wrongful Death Statute nor the Survival Statute. Vis-a-vis the Plaintiffs'/Appellees' live pleadings at the trial bench, TMSI's and TRMI's contentions as to the status of Dau Van Tran was in the nature of an affirmative defense. *TEX. R. CIV. P. 94* required such an affirmative pleading to give fair and reasonable notice to the Plaintiffs below. This, the Appellants failed to do. Indeed, there is documentary evidence in the case that Dau Van Tran was self-employed and simply had no employment relationship to the MISS MARY or the

captain thereof. There is really no contention and there is no question but that Dau Van Tran was not a longshoreman. He simply did not fit under the definition of a longshoreman, under the Longshore and Harbor Workers' Compensation Act, *33 U.S.C.A. Sec. 901* et seq. (1986). The tragic death occurred within the city limits of Port Arthur, Jefferson County. There is no application, here, of death on the high seas act, popularly known as "DOHSA", *46 U.S.C. Sec. 761* et seq. The high seas have been authoritatively limited as being more than one league, or about 3 miles, off the shoreline.

As early as 1928, the Supreme Court of the United States has held that a stage and a wharf are generally deemed to be an extension of the land. *T. Smith & Son, Inc. v. Taylor,* 276 U.S. 179, 48 S.Ct. 228, 72 L.Ed. 520 (1928). Importantly, *Executive Jet Aviation, Inc. v. Cleveland,* 409 U.S. 249, 93 S.Ct. 493, 34 L.Ed.2d 454 (1972), pointed out that a maritime locality, alone, was not sufficient to invoke the exclusive admiralty jurisdiction. Justice Stewart stressed that the main business of the admiralty court involves claims for cargo damage, collisions of vessels, injuries to seamen and the like. The Supreme Court of the United States found serious difficulties with using the locality test only, further pointing out that, for the federal admiralty jurisdiction to come into play, there must be a maritime nexus or connection; that is, some substantial relationship between the tort and traditional maritime activities, such as navigation or commerce on navigable waters. When such a relationship or nexus is absent, the fact that a tort may have occurred upon navigable waters is immaterial to any meaningful and determinative invocation of the jurisdiction of the admiralty courts.

The Fifth Circuit Court of Appeals for the United States, in 1981, decided *Karpovs v. State of Mississippi*, 663 F.2d 640 (5th Cir. 1981). Circuit Judge Politz, writing without a dissent, held, at page 648:

> ". . . Maritime jurisdiction does not extend to torts occurring on piers, bridges, jetties, or even ramps or railways running into the sea. *Rodrique v. Aetna Casualty Co.*, 395 U.S. 352, 89 S.Ct. 1835, 23 L.Ed.2d 360 (1969). Any suggested inroads on this long-standing rule ended in 1972, when the Supreme Court held that in addition to a maritime locality, admiralty jurisdiction will not lie unless there is a significant relationship between the tort claim and traditional maritime activity. *Executive Jet Aviation, Inc. v. Cleveland*, 409 U.S. 249, 93 S.Ct. 493, 34 L.Ed.2d 454 (1972); *Richardson v. Foremost Insurance Co.*, 641 F.2d 314 (5th Cir. 1981).

We simply find no significant relationship between the negligence claim herein and traditional maritime activity.

From the standpoint of parallel reasoning and analagous rationale and an analysis of the clear, congressional purpose, the compelling case is *The Tungus v. Skovgaard*, 358 U.S. 588, 79 S.Ct. 503, 3 L.Ed.2d 524 (1959). In *The Tungus, supra*, the Supreme Court reasoned and held that a policy expressed and enacted by the legislature of a sovereign state in passing a wrongful death statute is not merely that the death shall give rise to the right of recovery, nor that the tortious or negligent conduct resulting in the death shall be actionable; but, just as importantly, the damages provided by the wrongful death statute shall be recoverable when actions or omissions of a particular kind result in a death. Thus, it becomes in-

cumbent upon a court enforcing that legislative policy to enforce it all. The enforcing court may not pick or choose.

The Supreme Court reasoned that congressional enactments, such as the Death on the High Seas Act, clearly manifest that the rights, remedies and damages under the state death statutes (when deaths occur on state territorial waters), were all to be left unimpaired and that the overall intent of the Congress was to preserve; indeed, to insure the state's sovereignty over death actions even though caused by maritime torts occurring with the state's territorial waters. *See Mobil Oil Corp. v. Higginbotham,* 436 U.S. 618, 98 S.Ct. 2010, 56 L.Ed.2d 581 (1978). In 436 U.S., at page 620, Footnote 9, 98 S.Ct., at page 2012, Footnote 9, 56 L.Ed.2d, at page 584, Footnote 9, it reads:

> "9. Sec. 766. In addition, the statute preserved the applicability of local law on the Great Lakes, in the Panama Canal Zone, and within the States' territorial waters. Sec. 767. Rights under foreign wrongful-death laws were also preserved. Sec. 764."

Justice Oliver W. Holmes, a giant of a jurist, reasoned, in *Old Dominion Steamship Co. v. Gilmore,* 207 U.S. 398, 28 S.Ct. 133, 52 L.Ed. 264 (1907), that Congress had the power to regulate commerce and to legislate upon admiralty and maritime jurisdiction; further, the Congress could extend the judicial power to cases of admiralty and maritime jurisdiction. The Congress had been silent up to a point. Justice Holmes held that the savings to the suitors clause leaves open and in full force the common-law jurisdiction of the States' courts, even over torts committed at sea, and the State courts, in their decisions,

could and would follow their own notions about this field of law.

The reasoning and the holdings of *The Tungus, supra,* authorizes and, indeed, requires us to overrule the Appellants' points of error attacking the allowance of damages for mental anguish and damages by way of prejudgment interest, except as to future mental anguish. We conclude no prejudgment interest was awarded on future damages in the judgment. The judgment exceeds one million dollars.

We hold that the 60th Judicial District Court of Texas had jurisdiction and full authority to try the case, having jurisdiction and venue of the parties and the subject matter. Because of the locale of the injury and because of the lack of impact on general maritime commerce and navigation, inter alia; we decide that the governing, ultimate facts, as found by the trial bench, do not constitute a maritime tort. But, even if the facts, as found below, constituted a maritime tort, which we deny; nevertheless, the Texas District Court had full jurisdiction pursuant to Texas Wrongful Death Statute and the Texas Survival Statute. *Mobil Oil Corp. v. Higginbotham, supra,* and *Old Dominion Steamship Co. v. Gilmore, supra.*

28 U.S.C.A. Sec. 1333 (1966) specifically saves to the suitors in all cases all other remedies to which they are otherwise entitled. This saving to the suitors provision applies to any civil case that might otherwise be considered within the admiralty or maritime jurisdiction. Texas has provided other remedies under *TEX. CIV. PRAC. & REM. CODE ANN. Secs. 71.001 and 71.021* (Vernon 1986).

The Appellants' last point of error, VII, avers that the evidence is insufficient to support the findings of negligence and causation and the court's judgment based thereon and, as a subpoint, that the findings and judgment are so against the overwhelming weight and preponderance of the evidence as to be clearly wrong and unjust. We disagree. The above discussion overrules this point.

Appellants attack the trial bench's monetary award for loss of society, companionship and affection. They simply advance the contention that the amount of damages for this loss is excessive and against the great weight and preponderance of the evidence. They cite *Pope v. Moore,* 711 S.W.2d 622 (Tex. 1986), placing major reliance on *Pope v. Moore, supra.*

In *Pope, supra,* in a per curiam opinion by the Supreme Court, the court held that factual sufficiency is the sole remittitur standard for actual damages and in deciding whether the damages are excessive. Courts of appeal should employ the same test as for any other factually insufficient question. Courts of appeal must detail the relevant evidence, if any, requiring remittitur and when ordering a remittitur the appeals court shall clearly state why the fact finder's award is so factually insufficient or, on the other hand, so against the great weight and preponderance of the evidence as to be manifestly unjust.

Our court should be aware of the preachments in *Pool v. Ford Motor Co.,* 715 S.W.2d 629 (Tex. 1986), even in this bench-tried case. Pursuant to *Pope, supra,* and *Pool, supra,* upon an analysis of the evidence on this point, we cannot order a remittitur. The judgment below is affirmed.

AFFIRMED.

APPENDIX B

SUPREME COURT OF TEXAS
P.O. Box 12248
Supreme Court Building
Austin, Texas 78711
John T. Adams, Clerk

January 3, 1990

Mr. Michael C. Farrow
Clann, Bell & Murphy
1300 Post Oak Boulevard
Suite 2000
Houston TX 77056

Mr. Chris J. McGrath
Clann, Bell & Murphy
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Mr. Tommy L Yeates
Moore, Landrey, Garth & Jones
285 Liberty
Suite 1900
Beaumont TX 77701

RE: Case No. C-9222

STYLE: TEXACO REFINING & MARKETING INC.
and TEXACO MARINE SERVICES
v. ESTATE OF DAU VAN TRAN ET AL.

Dear Counsel:

Both applications for writ of error in the above referenced case were this day denied with the notation, Writ Denied.

Respectfully yours,

John T. Adams, Clerk

By /s/ BLANCA E. MORIN
Deputy

APPENDIX C

NO. B-127,026

IN THE DISTRICT COURT OF
JEFFERSON COUNTY, TEXAS
60TH JUDICIAL DISTRICT

ESTATE OF DAU VAN TRAN, ET AL.

vs.

TEXACO REFINING & MARKETING, INC., ET AL.

FINDINGS OF FACT
AND CONCLUSIONS OF LAW

I.

Findings of Fact

1. That on September 16, 1985 (the "date in question"), Texaco Refining & Marketing, Inc. and Texaco Marine Services, Inc. (hereinafter referred to as the "Texaco Defendants") were the owner and/or operator of the vessel in question, the "Texaco California".

2. That Dau Van Tran ("Dau") was a 25-year old Vietnamese, who was the oldest child of Vi Thi Pham (hereinafter referred to as "Pham") and Do Van Tran (hereinafter referred to as "Tran"), his mother and father, respectively.

3. That on the date in question, Dau was not married and had no children.

4. That on the date in question, Farmer Boy's Catfish Kitchens International, Inc. was the owner and operator

of Fisherman's Reef Dock in Sabine Pass, Jefferson County, Texas.

5. That on the date in question, Theresa Thi Nguyen and Anh Nguyen were the owners and/or operators of the fishing trawler "Miss Mary".

6. That on the date in question, Dau was not a crew member or employee of the "Miss Mary" and/or of Theresa Thi Nguyen and/or Anh Nguyen.

7. That on the date in question, Dau entered the water to remove a rope which had fouled the propeller of the "Miss Mary", while said vessel was moored at the Fisherman's Reef Dock in Sabine Pass, Texas.

8. That on the date in question, the Master of the "Texaco California" was Paul Kelley and the Sabine Pilot was Millard Scott.

9. That prior to the date in question, the Pilot, Millard Scott, had been involved in 3 previous accidents, hitting the Gulf Gate Bridge in 1987 and hitting 2 other vessels prior to that time, sinking at least 1 of said vessels.

10. That Plaintiffs' exhibits 6 through 13 were true and correct copies of various records pertaining to the "Texaco California" on the day in question, that were provided by the Texaco Defendants in response to discovery by Plaintiffs.

11. That Pilot Millard Scott went on board the "Texaco California" cn or about 1304 hours on the day in question.

12. That the "Texaco California" left the Texaco docks on or about 1324 hours on the day in question,

and that there were no other large vessels in the channel during the applicable time periods on the day in question.

13. That as the "Texaco California" was going down the channel towards Sabine Pass, it increased its speed to full ahead at Beacon 40 at 1413 hours.

14. That as the "Texaco California" continued on down the channel, it went past Beacon 38 at 1421 hours, at which point the vessel reduced its speed from full ahead to half speed.

15. That the "Texaco California" averaged 8.8 knots from Beacons 47 to 40, that said vessel averaged 11.3 knots from Beacon 40 to Beacon 38, and that said vessel averaged 9.75 knots from Beacon 38 to Beacon 32.

16. That from Beacon 47 through Beacon 32 is a distance of 7.3 miles, and that said vessel averaged approximately 9½ knots during said distance.

17. That Fisherman's Reef is approximately 0.5 to 0.6 miles from the channel in which the "Texaco California" was traveling.

18. That Fisherman's Reef docks are near or at Beacon 38.

19. That at the time the "Texaco California" came closest to Fisherman's Reef, it was traveling at least 11.3 knots, and in reasonable probability was traveling in excess of said speed.

20. That William Cooner, the Manager of the Sabine Pass Port Authority, observed a very large surge and wake between 2:00 p.m. and 2:30 p.m. on September 16, 1985, that in his opinion was caused by a large ship.

21. That Mr. Cooner described the surge and wake as the largest he has seen during his time at the Sabine Pass Port Authority, and that said wake came up on land 120 to 140 feet, causing 2 sandblasters who were working in the area to turn and flee from the wake.

22. That the "Texaco California" is approximately 715 feet long, 90 feet wide, and was drawing approximately 29 feet of water on the day in question.

23. That at 11.3 knots per hour, the "Texaco California" would displace approximately 1 million cubic feet of water per second.

24. That on the day in question, there was an approximate 15 knot per hour wind coming from the south, and a 2 foot high flood tide coming in.

25. That the "Texaco California" could have safely traveled half as fast as it actually did on the day in question, which would have eliminated the possibility of causing damage to divers and/or any other people who may have been in the water as the "Texaco California" passed.

26. That a ship such as the "Texaco California" is responsible for its wake and any damage caused thereby.

27. That the "Texaco California" was traveling at an excessive rate of speed on the day in question, causing an excessive surge of the "Miss Mary" at the Fisherman's wharf docks, which in turn caused the "Miss Mary" to crash against the dock in question, just as Dau was attempting to exit the water on the dock facilities, thereby crushing Dau between the "Miss Mary" and the dock.

28. That the "Texaco California" failed to keep a proper lookout on the day in question.

29. That the "Texaco California" failed to observe the rules of the road and the rules of good seamanship on the day in question.

30. That the Master of the "Texaco California" failed to control the speed of the Pilot on the day in question.

31. That the "Texaco California" failed to signal and/or to warn Dau that it was traveling at an excessive rate of speed on the day in question.

32. That each act described in Findings No. 27 through 31 constitute negligence.

33. That each act of negligence was a proximate cause of the death of Dau Van Tran.

34. That the conduct on the part of the "Texaco California" demonstrates an entire want of care, which raises the belief that the conduct complained of was the result of a conscious indifference to the rights or welfare of individuals such as Dau Van Tran.

35. That it was common knowledge up and down the Port Arthur Ship Channel that divers would from time to time be in the water working on vessels in various respects.

36. That because of said knowledge, it was essential that vessels such as the "Texaco California" travel at a slow rate of speed to avoid any possibility of injuring divers.

37. That the Master has the responsibility to control and direct the Pilot's conduct, including monitoring his speed, and reducing said speed if it is excessive, as it was in this situation.

38. That Farmer Boy's Catfish Kitchens International, Inc. did not commit any act of negligence.

39. That the decedent, Dau Van Tran, was negligent for attempting to get out of the water by climbing between the dock and shrimp boat.

40. That Dau, in the approximate 5 years prior to his death, contributed to his parents at the rate of approximately $1,000.00 a month.

41. That under Vietnamese custom, since Dau was the oldest son, he assumed leadership of the family unit, to include the mother, father and 9 siblings at the time in question.

42. That the decedent, Dau, would have continued to support his parents for the rest of their natural life expectancy, which in the case of the mother is 30.5 years and in the case of the father is 23.9 years.

43. That the parents shared a very close relationship with their son, Dau, and because of the negligence of the Texaco Defendants, said parents have been deprived of the companionship, affection and society of their son, Dau, both from the time of his death up through the time of trial, and for the rest of their natural lives.

44. That the parents have suffered severe mental anguish and sorrow as a result of the unfortunate and untimely death of their son, Dau, both from the time of the incident made the basis of the suit through the time of trial, and for the rest of the natural lives of the parents.

45. That the decedent, Dau, was conscious for at least 40 minutes after the incident in question occurred.

46. That the decedent, Dau, sustained excruciating pain and suffering and mental anguish during said 40 minute period.

47. That the decedent, Dau, incurred necessary medical expenses as a result of the negligence of the Texaco Defendants.

48. That the parents have incurred necessary and reasonable funeral and burial expenses as a result of the death of their son, Dau.

49. That the Texaco Defendants were not grossly negligent.

50. That to fairly compensate the Plaintiffs for the various elements of damages that they have suffered, the Court finds that the Plaintiff, Pham, should be awarded the sum of $250,000.00 for the mental anguish she has suffered from the time of the incident until the time of trial, $125,000.00 for the mental anguish that she will in reasonable probability suffer for the rest of her life because of the death of her son, Dau, $250,000.00 for the loss of companionship, affection and society for the time period from the date of the incident until the time of trial, and $125,000.00 for the loss of companionship, affection and society that she in reasonable probability will suffer for the rest of her natural life.

51. The Court finds that the father, Do Van Tran, should recover $125,000.00 for the mental anguish he has suffered from the time of the incident until the time of trial, $75,000.00 for the mental anguish that he in reasonable probability will suffer for the rest of his life because of the death of his son, Dau, $125,000.00 for the loss of companionship, affection and society for the

time period from the date of the incident until the time of trial, and $75,000.00 for the loss of companionship, affection and society that he in reasonable probability will suffer for the rest of his natural life.

52. That under the Survivorship Statute, the Court finds that the sum of $40,000.00 would be fair and reasonable to compensate the decedent for the conscious pain and suffering and mental anguish he endured during the 40 minute period he was conscious immediately after the crushing injury he received on the day in question.

53. That under the Survivorship Statute, the sum of $1,849.55 should be recovered for the reasonable and necessary medical expenses incurred on behalf of Dau, and the sum of $3,000.00 should be recovered which represents the reasonable and necessary funeral and burial expenses incurred.

54. That the parents have sustained damages in the sum of $30,000.00 for the pecuniary loss they have suffered from the time of the incident through the date of trial because of the death of their son.

55. That the sum of $100,000.00 would fairly and reasonably compensate the parents for the pecuniary loss that they in reasonable probability will suffer in the future for the wrongful death of their son, Dau.

56. That the decedent was 15% at fault and the Texaco defendants were 85% at fault.

57. That the Texaco defendants are entitled to a credit of $22,500.00 for the amount paid in settlement by Anh Nguyen and Theresa Nguyen.

II.

Conclusions of Law

1. That because of the negligence of the Texaco Defendants in various respects, each of which was a proximate cause of the Plaintiffs' damages, the Plaintiffs should recover from Texaco Refining & Marketing, Inc. and Texaco Marine Services, Inc., jointly and severally, the sum of $1,324,849.55 as actual damages, less $198,727.43, (which is the amount to be deducted for the 15% contributory negligence of the decedent) and also less $22,500.00 (the amount of settlement funds paid by AHN NGUYEN and THERESA NGUYEN to the Plaintiffs), which leaves a net recovery of $1,103,622.12.

2. That the Plaintiffs should take nothing of and from the Defendant, Farmer Boy's Catfish Kitchens International, Inc.

3. That the Texaco Defendants, Texaco Refining & Marketing, Inc. and Texaco Marine Services, Inc., should have and recover of and from Farmer Boy's Catfish Kitchens International, Inc., nothing.

4. That the Third-Party Plaintiffs, Texaco Refining & Marketing, Inc. and Texaco Marine Services, Inc., should have and recover of and from the Third-Party Defendants, Theresa Nguyen and Anh Nguyen, nothing.

5. That the Plaintiffs should be entitled to recover pre-Judgment interest on all elements of damages that have accrued from a time period 6 months after the incident in question up through the date Judgment is entered, which is the sum of $209,489.18.

6. That the Plaintiffs are entitled to recover post-Judgment interest at the rate allowed by law.

SIGNED this the 28th day of September, 1988.

/s/ GARY SANDERSON
Judge Presiding

APPENDIX D

NO. B-127,026

IN THE DISTRICT COURT OF
JEFFERSON COUNTY, TEXAS
60TH JUDICIAL DISTRICT

ESTATE OF DAU VAN TRAN, ET AL.

vs.

TEXACO REFINING & MARKETING, INC., ET AL.

FINAL JUDGMENT

BE IT REMEMBERED that on the 19th day of September, 1988, came on to be heard the above styled and numbered cause, and the Plaintiffs appeared in person and by and through their attorneys of record, and the Defendants appeared by and through their attorneys of record, and all parties announced to the Court that they agreed to try the case non-jury, and the Court proceeded to hear the evidence and argument of counsel, is of the opinion that the Plaintiffs should have and recover of and from TEXACO REFINING & MARKETING, INC. and TEXACO MARINE SERVICES, INC., jointly and severally, the sum of ONE MILLION ONE HUNDRED THREE THOUSAND SIX HUNDRED TWENTY TWO AND 12/100 DOLLARS ($1,103,622.12), that Plaintiffs should take nothing of and from the Defendant, FARMER BOY'S CATFISH KITCHENS INTERNATIONAL, INC., that TEXACO REFINING & MARKETING, INC. and TEXACO MARINE SERVICES, INC., should have and recover of and from FARMER BOY'S CATFISH KITCHENS INTERNATIONAL, INC.,

nothing, that the Third-Party Plaintiffs, TEXACO REFINING & MARKETING, INC. and TEXACO MARINE SERVICES, INC., should have and recover of and from the Third-Party Defendants, THERESA NGUYEN and ANH NGUYEN, nothing, that the Plaintiffs should be entitled to recover pre-Judgment interest on all elements of damages that have accrued from a time period six (6) months after the incident in question up through the date Judgment is entered, which is the sum of TWO HUNDRED NINE THOUSAND FOUR HUNDRED EIGHTY NINE AND 18/100 DOLLARS ($209,489.18), and that the Plaintiffs are entitled to recover post-Judgment interest at the rate allowed by law. It is, therefore,

ORDERED, ADJUDGED and DECREED that Plaintiffs DO VAN TRAN and VI THI PHAM recover of and from the Defendants, TEXACO REFINING & MARKETING, INC. and TEXACO MARINE SERVICES, INC., jointly and severally, the sum of ONE MILLION THREE HUNDRED THIRTEEN THOUSAND ONE HUNDRED ELEVEN AND 30/100 DOLLARS ($1,313,111.30).

It is further ORDERED, ADJUDGED and DECREED that Plaintiffs take nothing of and from the Defendant, FARMER BOY'S CATFISH KITCHENS INTERNATIONAL, INC.

It is further ORDERED, ADJUDGED and DECRRED that Defendants TEXACO REFINING & MARKETING, INC. and TEXACO MARINE SERVICES, INC., should have and recover of and from FARMER BOY'S CATFISH KITCHENS INTERNATIONAL, INC., nothing.

It is further ORDERED, ADJUDGED and DECREED that Third-Party Plaintiffs, TEXACO REFINING & MARKETING, INC. and TEXACO MARINE SERVICES, INC., should have and recover of and from the Third-Party Defendants, THERESA NGUYEN and ANH NGUYEN, nothing. The above sum shall draw interest at the legal rate from date of Judgment until paid. All other relief not expressly granted herein is denied.

SIGNED this the 28th day of September, 1988.

/s/ GARY SANDERSON
Judge Presiding

APPENDIX E

COURT OF APPEALS
NINTH DISTRICT OF STATE OF TEXAS
1001 PEARL, SUITE 330
BEAUMONT, TEXAS 77701
Phone 409 835-8402
SHIRLEY FORREST, CLERK

September 27, 1989

Michael C. Farrow
Clann, Bell & Murphy
20th Floor, Allied Bank Tower
1300 Post Oak Boulevard
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Jon B. Burmeister
Moore, Landry, Garth & Jones
285 Liberty, Suite 1900
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P.O. Box 3947
381 Broadway
Beaumont, TX 77704

Louis H. Beard
Wells, Peyton, Beard, Greenberg, Hunt
P.O. Box 3708
Beaumont, TX 77704

RE: CASE NO. 09-89-00009-CV

TRIAL COURT CASE NO. B-127,026

STYLE: Texaco Refining & Marketing, Inc. and
Texaco Marine Services
V: Estate of Dau Van Tran, et al

The Appellant's Motion for Rehearing in the above styled and numbered cause was overruled this date.

Respectfully yours,

SHIRLEY FORREST, CLERK

APPENDIX F

SUPREME COURT OF TEXAS
P.O. Box 12248
Supreme Court Building
Austin, Texas 78711
John T. Adams, Clerk

February 7, 1990

Mr. Michael C. Farrow
Clann, Bell & Murphy
1300 Post Oak Boulevard
Suite 2000
Houston TX 77056

Mr. Chris J. McGrath
Clann, Bell & Murphy
2000 First Interstate Tower
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Mr. Jon B. Burmeister
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Mr. Steven C. Barkley
Lindsay, Moses & Barkley
P. O. Box 3947
Beaumont TX 77704

Mr. Tommy L. Yeates
Moore, Landrey, Garth & Jones
285 Liberty
Suite 1900
Beaumont TX 77701

RE: Case No. C-9222

STYLE: TEXACO REFINING & MARKETING INC.
and TEXACO MARINE SERVICES
v. ESTATE OF DAU VAN TRAN ET AL.

Dear Counsel:

Today, the Supreme Court of Texas overruled petitioner's motion for rehearing of the application for writ of error in the above styled case.

Respectfully yours,

John T. Adams, Clerk

By /s/ COURTLAND CROCKER
Deputy

APPENDIX G

NO. B-127,026

IN THE DISTRICT COURT OF
JEFFERSON COUNTY, TEXAS
60TH JUDICIAL DISTRICT

ESTATE OF DAU VAN TRAN, ET AL.

vs.

TEXACO REFINING & MARKETING, INC., ET AL

PLAINTIFFS' THIRD AMENDED
ORIGINAL PETITION

TO THE HONORABLE JUDGE OF SAID COURT:

COMES NOW, ESTATE OF DAU VAN TRAN, by and through its administratrix, VI THI PHAM, and DO VAN TRAN and VI THI PHAM, INDIVIDUALLY, hereinafter referred to as Plaintiffs, complaining of TEXACO REFINING & MARKETING, INC., TEXACO MARINE SERVICES, INC., (hereinafter referred to as the "TEXACO" Defendants) and FARMER BOY'S CATFISH KITCHENS INTERNATIONAL, INC., Defendants herein, and for cause of action would respectfully show unto the Court the following:

I.

All parties are properly before the Court.

II.

On or about September 16, 1985, the Decedent, DAU VAN TRAN, was employed by Theresa Thi Nguyen and

Anh Nguyen, as the operators of the fishing trawler MISS MARY, Official No. 544790. Plaintiffs allege that on said date, the Decedent was instructed by his employers to enter the water and remove a rope which had fouled the propeller of a fishing trawler, while the vessel was moored at the Fisherman's Reef Barge Dock, Sabine Pass, Jefferson County, Texas. Plaintiffs allege further that while the Decedent was working in said water, a vessel owned and/or operated by the Defendants TEXACO MARINE SERVICES, INC. and/or TEXACO REFINING & MARKETING, INC. passed, causing the vessel that Decedent was working on to surge, resulting in DAU VAN TRAN sustaining fatal injuries when he was crushed between the vessel and the Fisherman's Reef Barge Dock.

III.

Plaintiffs would show that the TEXACO Defendants are liable to Plaintiffs under a theory of negligence and negligence per se which negligence was a proximate cause of the Decedent's injuries and subsequent death. More specifically, the TEXACO Defendants, acting by and through their various agents, employees, and/or representatives, were negligent and negligent per se to include the following: traveling past the Fisherman's Reef Barge Dock at too great a speed; in passing the Fisherman's Reef Barge Dock too closely; in failing to keep a proper lookout; in failing to properly supervise and/or control the pilot of the vessel; and in failing to signal and/or warn Decedent of the impending surge; and, in exceeding the speed limit of the Sabine Ship Channel. Moreover, Plaintiffs' allege that Defendants violated Article 29 of the Inland Rules, by failing to practice good seamanship.

In addition, Plaintiffs allege that the TEXACO Defendants are strictly liable to the Plaintiffs for the wake and/or surge of its vessel, and that the Plaintiffs should be allowed to recover under that theory as well. Plaintiffs allege that each act specified above is a proximate cause or producing cause of Plaintiffs damages.

IV.

On the occasion made the basis of this suit, Defendant, FARMER BOY'S CATFISH KITCHENS INTERNANATIONAL, INC., was the owner and occupier of the dock at which the incident forming the basis of this suit occurred and the owner of the "Miss Mary". DAU VAN TRAN, Decedent, was an invitee of the Defendant, FARMER BOY'S CATFISH KITCHENS INTERNATIONAL, INC. at the time of said incident. Plaintiffs allege that Defendant FARMER BOY'S CATFISH KITCHENS INTERNATIONAL, INC. was negligent in failing to provide a safe place to work, as well as various other acts and/or omissions of negligence and negligence per se which Plaintiffs may prove at the time of trial. Said negligence was a proximate cause of Plaintiffs' damages herein. In addition, Plaintiffs allege that the Decedent was a Jones Act seaman, and is entitled to recover not only for a violation of the Jones Act but also under general maritime law.

V.

Plaintiffs, DO VAN TRAN, et ux, VI THI PHAM, are the surviving parents and beneficiaries of DAU VAN TRAN, Deceased, and would show that they seek to recover those elements of damage for the death of their son pursuant to Section 71.002 *et seq.* and Section 71.021

et seq. of the Texas Civil Practice & Remedies Code. In connection therewith, Plaintiffs allege that the Deceased was never married, and had no children at the time of his death, and as the surviving parents are entitled to assert this cause of action. Plaintiffs allege that they are entitled to recover damages for all the various catagories of damage under the above referenced provisions in excess of the minimum jurisdictional requirements of this Honorable Court for which amount they now sue.

VI.

Plaintiffs would show that DAU VAN TRAN, Deceased, prior to his death, did provide many valuable services which had a pecuniary value and that had he lived, he would have continued to provide said services, as well as other services, and would have made various economic contributions to Plaintiffs from earnings which he made, and in all probability would have earned if he had lived. Plaintiffs would further show that they shared a very close relationship with their son and that as a result of the carelessness and negligence of the Defendants, they have been deprived of the companionship, affection and society of their son. Plaintiffs seek damages of and from the Defendants for the loss of companionship, affection and society of their deceased son. Plaintiffs would further show that they were caused to suffer severe mental anguish and sorrow as a result of the unfortunate and untimely death of their son, DAU VAN TRAN, Deceased, which death resulted from the negligence of the Defendants as herein alleged. Plaintiffs seek damages of and from the Defendants for their extreme mental anguish, both past and future, which has been a direct and proximate result of the negligence and carelessness of the Defendants.

VII.

As a result of the injuries and subsequent death of DAU VAN TRAN, Deceased, Plaintiffs have incurred necessary medical expenses, of which Plaintiffs seek recovery. In addition, as a result of the negligence of the Defendants, and the injuries and subsequent death to Plaintiff, DAU VAN TRAN, Deceased, caused solely by the negligence of the Defendants, Decedent experienced extreme physical pain, suffering, and mental anguish, of which Plaintiffs seek recovery herein.

VIII.

Plaintiffs would further show that they have incurred necessary funeral and burial expenses as a result of the death of their son, DAU VAN TRAN, Deceased, of which Plaintiffs seek recovery.

IX.

Plaintiffs further allege a cause of action against Defendants for gross negligence. Plaintiffs allege that the conduct on the part of the Defendants show an entire want of care, and that the Plaintiffs should be allowed to recover punitive damages in a sum which far exceeds the minimum jurisdictional limits of this Court.

X.

Plaintiffs further sue for both their pre-judgment and post-judgment interest thereon at the maximum extent allowed by law.

XI.

Plaintiffs hereby demand a trial by jury.

WHEREFORE, PREMISES CONSIDERED, Plaintiffs pray that upon final hearing hereof, Plaintiffs have judgment of and from the Defendants for actual damages and punitive damages in an amount which far exceeds the minimum jurisdictional requirements of this Court, costs of Court, pre-judgment and post-judgment interest thereon at the highest rate allowed by law, and for such other and further relief, at law or in equity, to which Plaintiffs may be justly entitled to receive.

Respectfully submitted,

MOORE, LANDREY, GARTH
& JONES

By: /s/ TOMMY L. YEATES
Tommy L. Yeates
TBA #22151100
Jon B. Burmeister
TBA #03425500
285 Liberty, Suite 1900
Beaumont, Texas 77701
(409) 835-3891

ATTORNEYS FOR PLAINTIFFS

CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of the foregoing Plaintiffs' Third Amended Original Petition has been mailed, certified, return receipt requested, to Mr. Michael C. Farrow, CLANN, BELL & MURPHY, 20th Floor, Allied Bank Tower, 1300 Post Oak Boulevard, Houston, Texas 77056, Mr. Peter A. McLauchlan, CLANN, BELL & MURPHY, 20th Floor, Allied Bank Tower, 1300 Post Oak Boulevard, Houston, Texas 77056, and to Mr. Steven C. Barkley, EVANS, MOSES & BARKLEY, 398 Pearl Street, Beaumont, Texas 77701, on this the 15th day of August, 1988.

/s/ TOMMY L. YEATES
Tommy L. Yeates

APPENDIX H

NO. B-127,026

IN THE DISTRICT COURT OF
JEFFERSON COUNTY, TEXAS
60TH JUDICIAL DISTRICT

ESTATE OF DAU VAN TRAN, ET AL

vs.

TEXACO REFINING & MARKETING INC., ET AL

DEFENDANTS' MOTION FOR NEW TRIAL OR, IN THE ALTERATIVE, TO MODIFY, CORRECT OR REFORM THE JUDGMENT OR, IN THE ALTERNATIVE, FOR REMITTITUR

TO THE HONORABLE JUDGE OF SAID COURT:

COME NOW Texaco Refining & Marketing Inc. and Texaco Marine Services Inc., Defendants herein, and respectfully move that the Court grant a new trial or, in the alternative, the Court modify, correct or reform the judgment or, in the alternative, move for a remittitur in the above-styled case. As grounds therefor, the following are submitted:

1. There is no evidence of record to support the finding of the Court and judgment thereon relative to the issue of negligence on the part of the Defendants.
2. The evidence of record is insufficient to support the finding of the Court and judgment thereon relative to the issue of negligence on the part of

the Defendants in that the finding and judgment are so contrary to the overwhelming weight of all the evidence as to be manifestly unjust or wrong.

3. There is no evidence of record to support the finding of the Court and judgment thereon relative to the issue of proximate causation on the part of the Defendants.

4. The evidence of record is insufficient to support the finding of the Court and judgment thereon relative to the issue of proximate causation on the part of the Defendants in that the finding and judgment are so contrary to the overwhelming weight of all the evidence as to be manifestly unjust or wrong.

5. The amount of damages awarded by the judgment is excessive, is supported by factually insufficient evidence and constitutes an abuse of discretion.

6. No or insufficient evidence supports the Court's findings and judgment thereon relative to the specific damages of mental anguish, loss of companionship, affection and society, and conscious pain, suffering and mental anguish.

7. Damages for mental anguish have been improperly included in the judgment inasmuch as such are not awardable under the legal principles which obtain herein.

8. The Court erred in sustaining the Plaintiffs' objection to the introduction of the testimony of Dan Gilbert.

9. The Court erred in sustaining the Plaintiffs' objection to the introduction of the testimony of Mitchell Horne.

10. The Court erred in admitting into evidence all exhibits represented to be documents provided

pursuant to requests for production inasmuch as no evidentiary foundation was established for any of such exhibits.

11. The Court erred in admitting into evidence discovery responses of the Defendants in a separate action.

Respectfully submitted,

CLANN, BELL & MURPHY

/s/ MICHAEL C. FARROW
Michael C. Farrow
TBA #060847750
Twentieth Floor
1300 Post Oak Boulevard
Houston, Texas 77056
(713) 871-0333

Attorneys for Defendants
Texaco Marine Services Inc. and
Texaco Refining & Marketing Inc.

CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of the Defendant's Motion for New Trial or, in the Alternative, to Modify, Correct or Reform the Judgment or, in the Alternative, for Remittitur was sent to all opposing counsel by certified mail, return receipt requested on this 27th day of October, 1988.

/s/ MICHAEL C. FARROW
Michael C. Farrow

APPENDIX I

NO. B-127,026

IN THE DISTRICT COURT OF
JEFFERSON COUNTY, TEXAS
60TH JUDICIAL DISTRICT

ESTATE OF DAU VAN TRAN, ET AL

vs.

TEXACO REFINING & MARKETING INC., ET AL

DEFENDANTS' MEMORANDUM IN SUPPORT OF THEIR MOTION FOR NEW TRIAL OR, IN THE ALTERNATIVE, TO MODIFY, CORRECT OR REFORM THE JUDGMENT OR, IN THE ALTERNATIVE, FOR REMITTITUR

TO THE HONORABLE JUDGE OF SAID COURT:

COME NOW Texaco Refining & Marketing Inc. and Texaco Marine Services Inc., Defendants herein, and respectfully submit the following memorandum on law in support of Point 7 set forth in their Motion for New Trial or, in the Alternative, to Modify, Correct or Reform the Judgment or, in the Alternative, for Remittitur.

On the 28th day of September 1988, this Court entered its findings of facts, conclusions of law and final judgment in the above styled case. The Court found, *inter alia*:

1. That on September 16, 1985, Texaco Refining & Marketing Inc. and Texaco Marine Services Inc. (hereinafter referred to as the "Texaco Defendants") were the

owner and/or operator of the vessel "TEXACO CALIFORNIA", (Findings of Fact, paragraph 1).

2. That Dau Van Tran ("Dau") was a 25 year old Vietnamese, who was the oldest child of Vi Thi Pham ("Pham") and Do Van Tran ("Tran") his mother and father respectively. (Findings of Facts, paragraph 2).

3. That on the date in question, Dau entered the water to remove a rope which had fouled the propeller of the "MISS MARY", while said vessel was moored at the Fisherman's Reef Dock in Sabine Pass, Texas. (Findings of Fact, paragraph 7)

4. That the "TEXACO CALIFORNIA" was traveling at an excessive rate of speed on the day in question, causing an excessive surge of the "MISS MARY" at the Fisherman's wharf docks, which in turn, caused the "MISS MARY" to crash against the dock just as Dau was attempting to exit the water on the dock facilities, thereby crushing Dau between the "MISS MARY" and the dock. (Findings of Fact, paragraph 27)

5. That the "TEXACO CALIFORNIA" failed to keep a proper lookout on the day in question. (Findings of Fact, paragraph 28)

6. That the "TEXACO CALIFORNIA" failed to observe the rules of the road and rules of good seamanship on the day in question. (Findings of Fact, paragraph 29)

7. That the Master of the "TEXACO CALIFORNIA" failed to control the speed of the pilot on the day in question. (Findings of Fact, paragraph 30)

8. That the "TEXACO CALIFORNIA" failed to signal and/or to warn Dau that it was traveling at an

excessive rate of speed on the day in question. (Findings of Fact, paragraph 31)

9. That each act described in Findings No. 27 through 31 constitute negligence. (Findings of Fact, paragraph 32)

10. That plaintiff Pham should be awarded $250,000.00 for the mental anguish she has suffered from the time of the incident until the time of the trial, $125,000.00 for the mental anguish that she will, in reasonable probability, suffer for the rest of her life because of the death of her son Dau. (Findings of Fact, paragraph 50)

11. That plaintiff Tran should recover $125,000.00 for the mental anguish he has suffered from the time of the incident until the time of trial, $75,000.00 for the mental anguish that he, in reasonable probability, will suffer for the rest of this life because of the death of his son Dau. (Findings of Fact, paragraph 51)

THE CLAIMS IN THIS CASE ARE WITHIN ADMIRALTY JURISDICTION AND THUS ARE GOVERNED BY SUBSTANTIVE MARITIME LAW

A tort claim comes within Admiralty jurisdiction of federal courts when the alleged wrong occurs on navigable waters within the United States and bears a significant relationship to a traditional maritime activity. *East River S.S. Corp. v. Transamerica Delaval,* 106 S.Ct. 2295, 2298 (1986); *Executive Jet Aviation Incorporation v. City of Cleveland,* 409 U.S. 249 (1972). Based upon the Court's findings of facts there is no doubt that admiralty jurisdiction exists over this case. The locality of the alleged wrong was in navigable waters and, as in *Kermarec Compagnie Generale Transatlantique,* 358 U.S. 625

(1959), there is an allegation of negligence concerning the navigation and/or operation of a vessel on navigable waters.

The Supreme Court in *Foremost Ins. Co. v. Richardson*, 457 U.S. 668, 674 (1982) recognized, "[b]ecause the 'wrong' here involves the negligent operation of a vessel on navigable waters, we believe that it has a sufficient nexus to traditional maritime activity to sustain admiralty jurisdiction in the [federal] District Court" just as this Court must.

With admiralty jurisdiction comes the application of substantive maritime law. *East River S.S. Corp. v. Transamerica Delaval*, 106 S.Ct. at 2299, *Executive Jet Aviation*, 409 U.S. at 255. Absent a relevant federal statute, the general maritime law, as developed by the judiciary, applies. *East River S.S. Corp.*, 106 S.Ct. at 2299, citing *United States v. Reliable Transfer Company*, 421 U.S. 397 (1975) and *Knickerbocker Ice Company v. Stewart*, 253 U.S. 149 (1920).

Although the "savings to suitors" clause, 28 U.S.C. § 1333, leaves state courts competent to adjudicate maritime causes of action in proceedings *in personam* to enforce rights granted in the general maritime law, a state court is free to act under that "savings" clause only "so long as it does not attempt to make changes in the 'substantive maritime law.'" *Madruga v. Superior Court*, 346 U.S. 556, 561 (1954). As the Supreme Court has observed, "in such cases the extent to which state law may be used to remedy maritime injuries is constrained by the so-called 'reverse-Erie' doctrine which requires that the substantive remedies afforded by the States conform to governing federal maritime standards." *Offshore Logistics, Inc. v. Tallentire*, 106 S.Ct. 2485, 2495 (1986).

In other words, the "savings" clause does no more than preserve the right of maritime suitors to pursue remedies in a state forum which is then required to apply general maritime law. It does not empower a state court exercising concurrent jurisdiction to redefine the requirements or limits of a remedy available at admiralty.

The Supreme Court laid the foundation of this doctrine in a series of cases commencing over 100 years ago. *See The Lottawana,* 21 Wall. 558, 575, 22 L.Ed. 654 (1875) (it is a constitutionally based principle that federal admiralty law should be a "system of law coextensive with, and operating uniformly in the whole country."); *Southern Pacific Co. v. Jensen,* 244 U.S. 205 (1917)., *Chelentis v. Luckenback S.S. Co.,* 247 U.S. 372 (1918)., *Knickerbocker Ice Co. v. Stewart,* 253 U.S. 149 (1920). This principle was recently recognized by the Fifth Circuit in *Powell v. Offshore Navigation, Inc.,* 644 F.2d 1063, 1065 n.5, (5th Cir. 1981), *cert. denied* 454 U.S. 972 (1981) ("state law may not conflict with federal maritime law as it would be redefining the requirements or limits of a remedy available at admiralty") (citations omitted).

MENTAL ANGUISH AND GRIEF ARE NOT RECOVERABLE AS DAMAGES IN A GENERAL MARITIME WRONGFUL DEATH ACTION

In *Moragne v. States Marine Liens, Inc.,* 398 U.S. 375 (1979), the Court, after lengthy review of maritime jurisprudence, overruled a long-recognized principle and specifically recognized a maritime wrongful death cause of action. Left for later determination was a crafting of the elements of damage within this remedy. Subsequently,

in *Sea-Land Services, Inc. v. Gaudet*, 414 U.S. 573 (1974), the Court specifically held that mental anguish or grief is *not* a compensable element. This was reaffirmed in *Offshore Logistics, Inc. v. Tallentine*, 106 S.Ct. 2485 (1986).

THE GENERAL MARITIME WRONGFUL DEATH ACTION PREEMPTS STATE WRONGFUL DEATH ACTS

One of the first courts to hold that the *Moragne* general maritime law cause of action for wrongful death preempts the application of state wrongful death acts was *Petition of United States Steel Corporation*, 436 F.2d 1256 (6th Cir. 1970). The case involved a collision between two vessels in Michigan territorial waters. Several seamen, employed by United States Steel, were killed when the vessels collided. Their beneficiaries asserted negligence claims against the other vessel which could not be based upon the Jones Act because of the lack of an employer-employee relationship. The decedents' survivors argued that their measure of damages should be reckoned under the Michigan Wrongful Death statute. However, the court held that the entire proceeding against this non-employer for the wrongful deaths of the seamen caused by the negligence of that non-employer were governed by principles of maritime law.

The court necessarily examined the history and development of the wrongful death body of law in maritime tort actions. It had been held in *The Harrisburg*, 119 U.S. 199 (1886) that absent a statutory right, there could be no recovery by the next-of-kin of a decedent killed as a result of a maritime tort. However, a judicial

exception was created to the rule of *The Harrisburg* for maritime torts resulting in death that occurred in the territorial waters of a state that statutorily permitted recovery for wrongful death. *See, Western Fuel Company v. Garcia*, 42 S.Ct. 89 (1921); *The Hamilton*, 207 U.S. 398 (1907). The *U.S. Steel* Court noted that the *Moragne* decision, in overruling *The Harrisburg* and providing a wrongful death remedy under maritime law, eliminated the need for both the *Western Fuel* exception to the rule and for tests designed to implement that exception. The Court held that all facets of the maritime law wrongful death recovery, including the measure of damages, were to be governed by the principles of maritime law. The Court reasoned that recognition of a right to recovery for wrongful death under general maritime law strongly dictated that in order to promote uniformity and supremacy of the maritime law that the measure of recovery must be governed by the principles of the general maritime law, where as in the *U.S. Steel* case, there was a conflict between the damages recoverable under the general maritime law and those recoverable under state law. *See also, Hornsby v. Fish Meal Co.*, 431 F.2d 865, 867 (5th Cir. 1970) (actions for wrongful death of two pilots killed in mid-air collision within one marine league of the Louisiana shore is governed by *Moragne* cause of action that is not dependent on adjacent state law.) Similarly, the court in *Matter of S/S Helena*, 529 F.2d 744 (5th Cir. 1976), held that the wrongful death remedy provided by *Moragne* precludes recognition in admiralty of state wrongful death statutes. Therefore, the general maritime law rather than the Louisiana wrongful death statute governed the right of recovery for wrongful death of seventeen seamen were killed in a collision between a

freighter and a U.S. Coast Guard vessel in Louisiana territorial waters.

The court justified its holding on two grounds. Firstly, the court stated that after *Moragne* there was no void in the general maritime law regarding wrongful death actions because *The Harrisburg* had been overruled. Therefore, there was no need to refer to state wrongful death statutes. *S/S Helena*, 529 F.2d at 752. Secondly, the other justification for the application of state wrongful death statutes in the pre-*Moragne* scheme was because of a special solicitude regarding state sovereignty in territorial waters. The *S/S Helena* court noted that the *Moragne* decision, by creating an expansive cause of action for sea-orientated deaths, whether caused by negligence or unseaworthiness, significantly interfered with the state's scheme for wrongful death recoveries and therefore was not "solicitous" with respect to state sovereignty. *Id.* at 752. The court therefore reasoned that the rationale implicit in *Moragne* for the many years of federal recognition of state statutes was that this recognition provided a remedy for breaches of federally imposed duties of the sea that resulted in death that were not compensable under the general maritime law due to *The Harrisburg* rule. The court observed, "Now that *The Harrisburg* has been overturned and a general maritime law remedy for wrongful death has been created, there is no longer a need for recognition and enforcement of state wrongful death statutes in the admiralty court." *Id.* at 753.

The *S/S Helena* ruling that state wrongful death actions have been supplanted by the *Moragne* general maritime law wrongful death action has been cited as an absolute proposition in several cases. *See e.g., Lemon v. Bank*

Lines, Ltd., 411 F.Supp. 677, 679 (S.D. Ga. 1976), affirmed without published opinion 562 F.2d 1259; *Sistrunk v. Circle Bar Drilling Company*, 770 F.2d 455, 456-457 (5th Cir. 1985), *rehearing en banc denied*, 775 F.2d 301 (5th Cir. 1985), *cert. denied* 475 U.S. 1019 (1986), *Trueheart v. Blandon*, 672 F. Supp. 929, 935 (E.D. La. 1987); *Nelson v. United States*, 639 F.2d 469 (9th Cir. 1980); *Evich v. Morris*, 819 F.2d 256, 257-258 (9th Cir. 1987), *cert. denied*, 108 S.Ct. 261 (1987).

However, even in the unlikely event this Court is not convinced by the wealth of precedent that the *Moragne-Gaudet* decisions preclude the application of state wrongful death statutes, the underlying policies of the *Moragne* general maritime law cause of action require that same result.

The *Moragne-Gaudet* line of cases has two aims. The first is to achieve uniformity in the exercise of admiralty jurisdiction and the second is to provide special solicitude to seamen. *See Moragne*, 398 U.S. 375, 385-389 and *Gaudet*, 414 U.S. 573, 578. With regard to the first aim of achieving uniformity in the exercise of admiralty jurisdiction, if state wrongful death statutes were permitted to operate and provide for the recovery of damages based on mental grief or anguish this would conflict with all federal maritime schemes of recovery. The Jones Act, 46 U.S.C. § 668, does not provide for non-pecuniary recovery nor does the Death on the High Seas Act, 46 U.S.C. § 761, 762. As noted, the *Gaudet* remedy itself does not allow for the recovery of damages for mental anguish or grief. *See, Gaudet*, 414 U.S. 573, 585 n. 17 ("Loss of society must not be confused with mental anguish or grief, which is not compensable under the maritime wrongful-death remedy. . . .")

The second aim of providing special solicitude to seamen would rarely be served. Granted, the dependents of a seaman who is killed in territorial waters due to the negligence of a non-employer would be able to recover non-pecuniary damages for loss of grief or anguish if the state's statute permitted. However, the instances in which this would occur would be less frequent than those in which a non-seaman was able to recover these damages supplied by state statute since a seaman is confined to his Death on the High Seas Act, Jones Act or general maritime law unseaworthiness actions in most cases. If recovery for mental anguish was permitted it would create a curious anomaly. Only when a seaman, in state territorial waters, was killed due to the negligence of a non-employer would his survivors be able to recover damages for their mental anguish. In all other situations, the Jones Act, Death on the High Seas Act or *Moragne-Gaudet* causes of action would prohibit the recovery of mental anguish non-pecuniary damages.

Finally, another principle that guided the Supreme Court in *Moragne* and *Gaudet,* was that although they were creating a new cause of action, the Court would look to general law, including state wrongful death actions, only where there was no analogous maritime law. *Moragne,* 398 U.S. at 387-93, 404-09; *Gaudet,* 414 U.S. at 578, 583-588. This is merely an application of the "reverse-*Erie*" doctrine which requires that substantive remedies afforded by the States conform to governing federal maritime standards. Therefore, in the unlikely event that this Court finds that *Moragne* does not in and of itself preclude state wrongful death statutes from supplying ~~a remedy~~ in state territorial waters for wrongful death, the state remedy must nonetheless be confined to

the analogous maritime law remedies provided by *Gaudet*. In *Gaudet*, 414 U.S. 573 at 585, the court in footnote 17 noted that the great majority of jurisdictions including several which do allow damages for non-pecuniary loss hold that grief, bereavement, anxiety, distress or mental pain or suffering of the beneficiaries may not be regarded as elements of damage in a wrongful death action. In this regard, *Sanchez v. Schindler*, 651 S.W.2d 249 (Tex. 1983) the case that changed the scope of recovery for the Texas Wrongful Death Act by permitting recovery of damages for mental anguish or bereavement by the parents of a minor child, the court noted there were few jurisdictions that shared its view allowing recovery by parents for mental anguish and even fewer that permitted parents who did not witness the events causing their child's death to recover for their mental anguish. Therefore, the potential for creating inconsistencies rather than uniformity when maritime jurisdiction exists is even greater since the scope of recovery will vary from state to state if the maritime remedy is not recognized and applied.

Respectfully submitted,

CLANN, BELL & MURPHY

/s/ MICHAEL C. FARROW
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1300 Post Oak Boulevard,
20th Floor
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(713) 871-0333

Attorneys for Defendants,
Texaco Marine Services Inc. and
Texaco Refining & Marketing Inc.

CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of the Defendants' Memorandum in Support of its Motion for New Trial, or, in the Alternative, to Modify, Correct or Reform the Judgment or, in the Alternative, for Remittitur was forwarded to all opposing counsel by Federal Express, properly addressed as follows:

Mr. Steven C. Barkley
EVANS, MOSES & BARKLEY
815 Goodhue Building
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Federal Express AirBill No. 9162015052

Mr. Jon B. Burmeister
MOORE, LANDREY, GARTH & JONES
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Beaumont, Texas 77701
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on this 3rd day of November, 1988.

/s/ MICHAEL C. FARROW
Michael C. Farrow

APPENDIX J

NO. B-127,026

IN THE DISTRICT COURT OF
JEFFERSON COUNTY, TEXAS
60TH JUDICIAL DISTRICT

ESTATE OF DAU VAN TRAN, ET AL

vs.

TEXACO REFINING & MARKETING, INC., ET AL

Defendants' Supplemental Memorandum in Support of Their Motion for New Trial or, in the Alternative, to Modify, Correct or Reform the Judgment or, in the Alternative, for Remittitur

TO THE HONORABLE JUDGE OF SAID COURT:

COME NOW Texaco Refining & Marketing Inc. and Texaco Marine Services Inc., Defendants herein, and respectfully submit the following supplemental memorandum of law specifically concerning the imposition of prejudgment interest.

A party claiming a maritime cause of action, as the Defendants do herein insofar as the movants are concerned, may elect to bring an action at law pursuant to 28 U.S.C. § 1333, commonly known as the savings to suitors clause. It is for this reason that such an action may be prosecuted in a state court inasmuch as the federal courts have exclusive jurisdiction over causes of action brought in admiralty. 28 U.S.C. § 1333(1).

A recognized advantage to proceeding in admiralty rather than at law is the discretion of the Court to award prejudgment interest in those cases. *Pickle v. International*

Oilfield Divers, Inc., 791 F.2d 1237 (5th Cir. 1986). On the opposite hand, if the claimant elects a state forum for adjudication, he trades off his right to prejudgment interest for the choice of court just as he trades his right to interest for a right to jury. *Snyder v. Whittaker Corporation*, 839 F.2d 1085 (5th Cir. 1988); *Martin v. Walk, Haydel & Associates, Inc.*, 794 F.2d 209 (5th Cir. 1986). This principle was confirmed recently in *Monessen Southwestern Railway Co. v. Morgan*, 108 S.Ct. 1837 (1988). Therein, the Plaintiff claimed, as the Plaintiffs will undoubtedly do herein, that state law provided an entitlement to prejudgment interest. The Court, in this FELA action, explicitly rejected this, holding that the proper measure of damages must be determined by federal law. Herein, the Plaintiffs stand in the same position as they would in federal court had they brought suit on the law side vice admiralty side of the federal court. In that situation, they would not be entitled to an award of prejudgment interest and thus they are not so entitled herein, Texas law notwithstanding.

Respectfully submitted,

CLANN, BELL & MURPHY

/s/ MICHAEL C. FARROW
Michael C. Farrow
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Twentieth Floor
1300 Post Oak Boulevard
Houston, Texas 77056
(713) 871-0333
ATTORNEYS FOR
DEFENDANTS
TEXACO MARINE
SERVICE INC. AND
TEXACO REFINING &
MARKETING INC.

Certificate of Service

I hereby certify that a true and correct copy of the Defendants' Supplemental Memorandum in Support of Their Motion for New Trial or, in the Alternative, to Modify, Correct or Reform the Judgment or, in the Alternative, for Remittitur was sent by Federal Express ot Jon B. Burmeister, Moore, Landrey, Garth & Jones, Liberty-Pearl Complex, 285 Liberty, Suite 1900, Beaumont, Texas 77701; and Steven C. Barkley, Evans, Moses & Barkley, 815 Goodhue Building, Beaumont, Texas 77701; on this 6th day of December, 1988.

/s/ MICHAEL C. FARROW
Michael C. Farrow

APPENDIX K

NO. B-127,026

IN THE DISTRICT COURT OF
JEFFERSON COUNTY, TEXAS
60TH JUDICIAL DISTRICT

ESTATE OF DAU VAN TRAN, ET AL.

vs.

TEXACO REFINING & MARKETING, INC., ET AL.

MOTION TO AMEND FINDINGS OF FACT

TO THE HONORABLE JUDGE OF SAID COURT:

COMES NOW the Plaintiffs, and file this their Motion to have the Court amend its Finding of Fact #50 and Finding of Fact #51, and would show unto the Court the following:

I.

In Finding of Fact #50 and Finding of Fact #51, the Court awarded a certain sum of money representing mental anguish for both the mother and father of the decedent. Based upon one of the points mentioned in the Motion for New Trial filed by the TEXACO Defendants, said Defendants allege that under general maritime law, the Court may not award damages for mental anguish. In that event, the Plaintiffs would respectfully request that the Court reconsider its award for loss of companionship, affection and society, both past and future, for both the mother and father.

WHEREFORE, PREMISES CONSIDERED, Plaintiffs pray that their Motion to Amend Findings of Fact be granted, and for such other and further relief to which they may show themselves justly entitled to receive.

Respectfully submitted,

MOORE, LANDREY, GARTH
& JONES
Liberty-Pearl Complex
285 Liberty, Suite 1900
Beaumont, TX 77701
(409) 835-3891

By /s/ JON B. BURMEISTER
Jon B. Burmeister, of Counsel
TBA #03425500

ATTORNEYS FOR PLAINTIFFS

CERTIFICATE OF SERVICE

The undersigned hereby certifies that a true and correct copy of the foregoing instrument has been mailed certified, return receipt requested, to Mr. Michael C. Farrow, CLANN, BELL & MURPHY, 1300 Post Oak Blvd., 20th Floor, Houston, TX 77056, and to Mr. Steven C. Barkley, EVANS, MOSES & BARKLEY, 815 Goodhue Bldg., Beaumont, TX 77701, on this the 8th day of November, 1988.

/s/ JON B. BURMEISTER
Jon B. Burmeister

Supreme Court, U.S.
FILED
JUN 6 1990
JOSEPH F. SPANIOL, JR.
CLERK

No. 89-1754

In The

Supreme Court of the United States

October Term, 1989

TEXACO REFINING AND MARKETING INC.
and
TEXACO MARINE SERVICES INC.,

Petitioners,

v.

THE ESTATE OF DAU VAN TRAN,
VI THI PHAM and DO VAN TRAN,

Respondents.

RESPONDENTS' REPLY BRIEF TO PETITION FOR A WRIT OF CERTIORARI

MOORE, LANDREY, GARTH & JONES
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BEST AVAILABLE COPY

QUESTIONS PRESENTED FOR REVIEW

1. Have Petitioners waived their right to urge their current points of error that the Texas Wrongful Death Act is inapplicable to the present case?

2. May a state court apply its wrongful death act in a case arising out of the death of a non-maritime civilian volunteer on a dock located within a state's territorial waters?

3. Does the tort made the basis of this suit constitute a maritime tort within the meaning of federal maritime law, since the case involves a non-maritime civilian volunteer who was killed on a dock?

CERTIFICATE OF INTERESTED PARTIES

The following were parties in the proceedings below in addition to those parties identified in the caption hereof:

Farmer Boy's Catfish Kitchens International, Inc.
Theresa Nguyen
Anh Nguyen

The parent of Petitioner TEXACO REFINING & MARKETING INC. is:

TRMI Holdings Inc. which is owned by TEXACO, INC.

The parent of Petitioner TEXACO MARINE SERVICES INC., is:

Texaco Overseas Holdings Inc. which is owned by TRMI Holdings Inc. which is owned by TEXACO, INC.

The following is a list of the subsidiaries and/or affiliates of TEXACO INC. which have publicly-held debt or equity securities:

Texaco Capital Inc.
Texaco Capital N.V.
Texaco International Finance Corp.
Texaco Inc.
Texaco Mexicana S.A. de C.V.
Texaco Togo
Texaco Nigeria Limited
Texaco Ghana Limited
Refineria Texaco de Honduras S.A.

TABLE OF CONTENTS

Page

QUESTIONS PRESENTED FOR REVIEW i

CERTIFICATE OF INTERESTED PARTIES ii

TABLE OF CONTENTS iii

TABLE OF AUTHORITIES iv

OPINION SOUGHT TO BE REVIEWED 1

STATEMENT OF JURISDICTION 1

STATEMENT OF THE CASE 1

ARGUMENT 3

A. PETITIONERS HAVE WAIVED THE RIGHT TO URGE THEIR CURRENT POINTS OF ERROR THAT THE TEXAS WRONGFUL DEATH ACT IS INAPPLICABLE TO THE PRESENT CASE 3

B. A STATE COURT MAY APPLY ITS WRONGFUL DEATH ACT IN A CASE ARISING OUT OF THE DEATH OF A NON-MARITIME CIVILIAN VOLUNTEER OCCURRING ON A DOCK LOCATED WITHIN A STATE'S TERRITORIAL WATERS ... 7

C. THE TORT MADE THE BASIS OF THIS SUIT DOES NOT CONSTITUTE A MARITIME TORT WITHIN THE MEANING OF FEDERAL MARITIME LAW, SINCE THE CASE INVOLVES A NON-MARITIME CIVILIAN VOLUNTEER WHO WAS KILLED ON A DOCK 21

CONCLUSION AND PRAYER FOR RELIEF 24

TABLE OF AUTHORITIES

Page

CASE

Borders v. KRLB, Inc., 727 S.W.2d 357 (Tex. App. – Amarillo 1987 writ ref'd n.r.e.) 4

Caldarola v. Eckert, 332 U.S. 155 (1947)..... 11

Christian v. First National Bank of Weatherford, 531 S.W.2d 832 (Tex. Civ. App. – Fort Worth 1975, writ ref'd. n.r.e.) 6

Executive Jet Aviation, Inc. v. City of Cleveland, Ohio, 409 U.S. 249 (1972) 22, 24

FMC Finance Corp. v. Murphree, 632 F.2d 413 (5th Cir. 1980) 7

Garrett v. Moore-McCormack Co., 317 U.S. 239 (1942) 10

Hays Consolidated Independent School District v. Valero Transmission Company, 645 S.W.2d 542 (Tex. App. 1982) 5

Highway Contractors, Inc. v. West Texas Equipment, Inc., 617 S.W.2d 791 (Tex. App. – Amarillo 1981 no writ)..... 4

Just v. Chambers, 312 U.S. 383 (1941) 17

Karpovs v. State of Mississippi, 663 F.2d 640 (5th Cir. 1981)..... 24

Lamp v. United States Steel Corp., 436 F.2d 1256 (6th Cir. 1970) cert. denied 402 U.S. 987, reh'g denied 403 U.S. 924 (1971)..... 20

Lyon v. The Ranger III, 858 F.2d 22 (1st Cir. 1988) 20

Matter of S/S Helena, 529 F.2d 744 (5th Cir. 1976) 20

TABLE OF AUTHORITIES – Continued

Page

Minnie v. Port Huron Terminal Co., 295 U.S. 647 (1935) 23

Mobil Oil Corp. v. Higginbotham, 436 U.S. 617 (1978) 13

Moragne v. State Marine Lines, Ltd., 398 U.S. 375 (1970) 7, 13, 18, 19

Nelson v. United States, 639 F.2d 469 (9th Cir. 1980) 20

Offshore Logistics v. Tallentire, 477 U.S. 207 (1986) 8, 12, 15, 16, 17, 18

Richardson v. Foremost Insurance Company, 641 F.2d 314 (5th Cir. 1981)..... 24

Rodrigue v. Aetna Casualty & Surety Company, 395 U.S. 352 (1969) 23, 24

Romero v. International Terminal Operating Co., 358 U.S. 354 (1959) 17

Sea-land Services, Inc. v. Gaudet, 414 U.S. 573 (1974) ..8, 19

Singleton v. Wulff, 428 U.S. 106 (1976) 6

Southern Pacific Co. v. Jensen, 244 U.S. 205 (1917) 12

State of California Department of Mental Hygene v. Bank of Southwest National Association, 354 S.W. 576 (Tex. 1962) 6

State of California v. Taylor, 353 U.S. 553 (1957) 6

Steamboat Co. v. Chase, 16 Wall. 522 (1873)..... 12

T. Smith & Son, Inc. v. Taylor, 276 U.S. 179 (1928) .21, 23

The Admiral Peoples, 295 U.S. 649 (1935)..... 23

The Harrisburg, 119 U.S. 199 (1886)..... 7, 8, 18

TABLE OF AUTHORITIES – Continued

Page

The Tungus v. Skovgaard, 358 U.S. 588 (1959)..... 9

Western Fuel Co. v. Garcia, 257 U.S. 233 (1921)..... 12

TREATISES

2 *R. McDonald, Texas Civil Practice in District and County Courts*, § 7.34.1 (rev. 1982)..... 5

Wright, Miller & Cooper, Jurisdiction, § 3672..... 15

UNITED STATES STATUTES

28 U.S.C. § 1257..... 1

46 U.S.C. § 688..... 8

46 U.S.C. § 761..... 8

UNITED STATES SUPREME COURT RULES

Rule 17.1..... 1

TEXAS RULES OF CIVIL PROCEDURE

Rule 94..... 4

TEX. CIV. PRAC. & REM. CODE ANN.

Section 71.001-71.002 (Vernon 1986)..... 3

Section 71.021 (Vernon 1986)..... 3

OPINION SOUGHT TO BE REVIEWED

The opinion of the Texas Court of Appeals that Petitioners seek to have reviewed was reported as *Texaco Refining & Marketing, Inc. v. Estate of Tran*, 777 S.W.2d 783 (Tex. App. – Beaumont, 1989).

STATEMENT OF JURISDICTION

Respondents contend that this Court does not have jurisdiction to consider Petitioners' Writ under 28 U.S.C. § 1257 as alleged. Petitioners have not shown that the validity of any United States or state statute or treaty is in question or that any laws of the United States are in question, or that any constitutional provision or treatise or statute thereof is at issue.

Further, Respondents contend that Petitioners have not shown that there are any special and important reasons for granting this Writ under Supreme Court Rule 17.1. Since review of the Petition For Writ of Certiorari is a matter of judicial discretion, Respondents respectfully request that the Court deny Petitioners' Writ of Certiorari.

STATEMENT OF THE CASE

In accordance with the Rules of the United States Supreme Court, Respondents desire to expand upon the statement of the case as presented by the Petitioners.

This action was a wrongful death/survivorship lawsuit stemming from an incident occurring on September

16, 1985, wherein Dau Van Tran was crushed to death while climbing up the side of a dock barge located on the Port Arthur Ship Channel in Port Arthur, Texas.

It is important to note that Dau was not a Jones Act seaman, nor a harbor worker, nor a longshoreman, but merely was a civilian volunteer, a "good samaritan," who had assisted a much older Vietnamese man untangle a rope from the propeller of the older man's boat. Dau climbed out of the water, up the side of the dock barge, just as the surge from the TEXACO CALIFORNIA slammed the boat up against the dock barge, crushing Dau.

Suit was brought by the parents of Dau against the two Texaco Defendants (Petitioners herein), under the provisions of the Texas Wrongful Death and Survivorship Statutes, alleging negligence, and against an entity known as Farmer Boy's Catfish Kitchens International, Inc., the owner/operator of the dock and fishing vessel involved in the incident. Early in the lawsuit, it was thought that Dau was a member of the crew of the vessel involved, but subsequent discovery indicated that he was not.

In their brief, Petitioners state that Respondents pleaded against Texaco that Dau was a Jones Act seaman, which is not true. The pleadings referred to apply only to Farmer Boy's, and were abandoned at the time of trial, since it turned out Dau was a volunteer and not a seaman.

Petitioners went to trial, knowing full well that Respondents were seeking recovery for various elements of damages, including mental anguish and pre-judgment

interest, under the Texas statutes mentioned above, but yet failed to plead that Respondents were not entitled to recover such damages, or that federal maritime law applied. In fact, Petitioners did not assert in the Trial Court any of the defenses they are now asserting. It was only after judgment was entered that Petitioners asserted for the first time that mental anguish damages could not be recovered; but since there were no pleadings to that effect, their Motion for New Trial was overruled by operation of law.

ARGUMENT

A. PETITIONERS HAVE WAIVED THEIR RIGHT TO URGE THEIR CURRENT POINTS OF ERROR THAT THE TEXAS WRONGFUL DEATH ACT IS INAPPLICABLE TO THE PRESENT CASE

Petitioners argue that the deceased, DAU, was a seaman, and that since he was injured on navigable waters, "general maritime law" should not only control but be the exclusive law applicable. Petitioners further argue that pursuant to general maritime law, damages for mental anguish and/or interest should not be allowed.

However, Petitioners never pled nor proved that DAU was a seaman nor that the remedies under the Texas Wrongful Death Statute, TEX. CIV. PRAC. & REM. CODE ANN. Secs. 71.001-71.002 (Vernon 1986), and the Texas Survival Statute TEX. CIV. PRAC. & REM. CODE ANN. Sec. 71.021 (Vernon 1986) were limited by general maritime law. The Petitioners proceeded to trial upon their Original Answer, in which they set up the following

affirmative defenses: (1) contributory negligence of DAU; (2) negligence of third parties; (3) assumption of the risk; and, (4) unavoidable accident. See Appendix "A" at 2a. Nowhere in the pleadings at the trial court level did the Petitioners invoke the constitutional and/or statutory provisions they now claim. In addition, Petitioners were well aware that Respondents were seeking to recover damages for mental anguish as well as for loss of companionship, affection and society. Thus, under Rule 94 of the Texas Rules of Civil Procedure (T.R.C.P.) and Texas case law, Petitioners have waived the points they now assert. Rule 94 requires a party, when pleading to a preceding pleading, to set forth affirmatively any "matter constituting an avoidance or affirmative defense." Tex.R.Civ.P. 94. An affirmative defense has been defined as "a denial of the plaintiff's right to judgment even if the plaintiff establishes every allegation in its pleadings." *Highway Contractors, Inc. v. West Texas Equipment Company, Inc.*, 617 S.W.2d 791, 794 (Tex. App. – Amarillo 1981, no writ).

A recent Texas appellate decision discussing Rule 94 is *Borders v. KRLB, Inc.*, 727 S.W.2d 357 (Tex. App. – Amarillo 1987, writ ref'd n.r.e.).

> Rule 94 of the Texas Rules of Civil Procedure requires a party, when pleading to a preceding pleading, to set forth affirmatively any 'matter constituting an avoidance or affirmative defense.' The affirmative pleading is necessary because a general denial is only a negative plea that places in issue the allegations a plaintiff is required to prove. The general denial 'does not open the way for evidence to support propositions which do not negative the plaintiff's claim, but go to support some independent reason why

> the plaintiff is barred from recovering . . . (cites omitted) 727 S.W.2d at 360.

In this case Petitioners claim for the first time on appeal that the Texas Wrongful Death Statute and Texas Survival Statute are not proper avenues of recovery for Respondents. Petitioners are thus arguing that even if Respondents' claims are true, the statutes as pled by Respondents in support of their claim do not allow them to recover under the facts of this case. This is a defense in avoidance or a defense which, if pled and proved, entirely bars Respondents from recovering for mental anguish. The following quote from *Hays Consolidated Independent School District v. Valero Transmission Company*, 645 S.W.2d 542 (Tex. App. – Austin 1982, writ ref'd n.r.e.) illustrates that the defense relied on by Petitioners is an affirmative defense:

> Affirmative defenses, as opposed to a defendant's denials, are the propositions which a defendant may assert and interpose to defeat a prima facie case made by the plaintiff. 'They open the way for the defendant to introduce evidence which does not tend to rebut the factual propositions asserted in plaintiff's case, but which seeks to establish an independent reason why the plaintiff should not recover.' 2 McDonald, Texas Civil Practice, § 7.34.1, at 220 (1982).

Thus, where a party fails to plead an affirmative defense, the trial court cannot award judgment thereon. A court's judgment must conform to the pleadings. This rule is so strict that "evidence will not cure the failure of a judgment to conform to the pleadings." *Hays*, 645 S.W.2d at 545 to 546.

The penalty for failing to plead an affirmative defense is harsh under Texas case law. According to a long line of precedent, affirmative defenses must be pleaded and proved or they are waived. *Christian v. First National Bank of Weatherford,* 531 S.W.2d 832 (Tex. Civ. App. – Forth Worth 1975, writ ref'd. n.r.e.). Since Petitioners neither pled nor proved the inapplicability of the Texas Wrongful Death Statute to this case, they waived their defense and may not assert it for the first time on appeal.

Petitioners make the convoluted argument that since Respondents pled the applicability of general maritime law to this case, that Petitioners were not required to plead the inapplicability of the Texas statute. As mentioned above, a careful reading of Respondents' pleadings shows that Respondents pled the general maritime law only as to Defendant Farmer Boy's Catfish Kitchens International, Inc. Respondents sought recovery against Petitioners only under the Texas Wrongful Death Statute and Survival Statute; thus, it was incumbent upon Petitioners to plead its inapplicability. Importantly, even had Respondents pled for recovery under both the general maritime law and the Texas Wrongful Death Act, Petitioners still would not have been relieved of the burden of proving the state statute's inapplicability to this case.

Additionally, this Court stated in *Singleton v. Wulff,* 428 U.S. 106, 121 (1976) that a federal appellate court generally does not consider an issue not passed upon below. See also *State of California v. Taylor,* 353 U.S. 553, 556 (1957). Thus, under both state and federal procedural rules, Petitioners have waived their defense by not raising it at the trial court level. See *State of California Department of Mental Hygene v. Bank of Southwest National*

Association, 354 S.W. 576, 581 (Tex. 1962); *FMC Finance Corp. v. Murphree*, 632 F.2d 413, 419 (5th Cir. 1980).

B. A STATE COURT MAY APPLY ITS WRONGFUL DEATH ACT IN A CASE ARISING OUT OF THE DEATH OF A NON-MARITIME CIVILIAN VOLUNTEER OCCURRING ON A DOCK LOCATED WITHIN A STATE'S TERRITORIAL WATER

For over a century state wrongful death statutes have provided a remedy to those whose decedents are killed in state territorial waters. Under the rule of The *Harrisburg*, 119 U.S. 199 (1886), general maritime law did not afford a cause of action for death resulting from a maritime tort. Thus, from 1886 until 1970 state wrongful death statutes provided the only cause of action to survivors of those killed in state territorial waters. In 1970 this court expressly overruled *The Harrisburg* in *Moragne v. State Marine Lines, Ltd.*, 398 U.S. 375 (1970) and held that federal maritime law afforded a remedy for tortious deaths occurring on state territorial waters. *Moragne*, 398 U.S. at 377. Cases decided both before and after *Moragne* indicate that the Moragne decision should not be construed as holding that general maritime law preempts state statutory remedies for those deaths.

Nevertheless, Petitioners would have this Court believe that substantive maritime law preempts state wrongful death statutes and provides a limited remedy for fatalities occurring *within state territorial waters*. They cite as authority the cases of *Moragne v. States Marine*

Lines, Inc., supra; Sea-Land Services, Inc. v. Gaudet, 414 U.S. 573 (1974), and *Offshore Logistics, Inc. v. Tallentire*, 477 U.S. 207 (1986). However, none of these cases stands for the proposition that federal maritime law preempts state wrongful death statutory remedies, *within state territorial waters*.

To understand what precipitated the *Moragne* decision, it is necessary to go back over one hundred years to the decision in *The Harrisburg, supra*. In that case, this Court held that maritime law did not afford a cause of action for wrongful death.

From the date of *The Harrisburg* until 1920, there was no remedy for death on the high seas. For deaths *within state territorial waters*, the federal law accommodated the humane policies of state wrongful death statutes by allowing recovery whenever an applicable state statute favored such a recovery.

Congress acted in 1920 to furnish the remedy denied by the courts for deaths *beyond the jurisdiction of any state*, by passing two landmark statutes, the Death on the High Seas Act, 46 USC § 761, as well as The Jones Act, 46 USC § 688.

It is important to note that the *Moragne* case involved a widow bringing suit in state court against the owner of the vessel to recover damages for wrongful death and for pain and suffering experienced by the decedent prior to his death, under the concept of negligence *and* under the concept of *unseaworthiness* of the vessel. The case was removed to federal court based upon diversity of citizenship. A third party complaint was filed and subsequently

both the defendant and third-party defendant sought dismissal of that portion of the Petitioner's complaint that requested damages for wrongful death on the basis of *unseaworthiness*. The defendants contended that maritime law did not provide a recovery for wrongful death within a state's territorial waters and that the statutory right of action for death under Florida law did not encompass unseaworthiness as a basis of liability. The lower courts all agreed, prompting this Court to grant certiorari.

This Court held that a non-statutory cause of action, similar to that provided under DOSHA, is available if a seaman's death is caused by the violation of traditional duties under maritime law, such as the duty to provide a seaworthy vessel. The *Moragne* Court noted that when Congress enacted the Death On The High Seas Act in 1920, it intended to leave state wrongful death remedies intact. *Moragne*, 398 U.S. at 400. However, Congress did not intend to foreclose any "non-statutory federal remedies that might be found appropriate to effectuate the policy of general maritime law." Id. Nowhere in *Moragne* did this court intimate that state wrongful death statutes were preempted by federal maritime law in this area; rather, the *Moragne* decision "merely removes the bar to access to the general maritime law." *Moragne*, 398 U.S. at 404.

If a person is injured in a *state's territorial waters*, and dies, then his survivors can recover for negligence or unseaworthiness provided that the state wrongful death statute allows recovery on such theories of liability. *The Tungus v. Skovgaard*, 358 U.S. 588 (1959). In that case, the motor vessel TUNGUS was docked at Bayonne, New Jersey, with a cargo of coconut oil in its deep tanks. A

shore-based company was employed to handle the discharge of the cargo. Because of some pump problems, Carl Skovgaard, a foreman with the shore-based company, was summoned from his home shortly after midnight to assist in the repairwork. After arriving on board, he walked through an area in which oil had been spilled, slipped, and fell to his death in eight feet of hot coconut oil.

The widow sued in admiralty, alleging various causes of action, to include a cause of action under the New Jersey Wrongful Death Act. This Court granted certiorari to consider the relationship of maritime and local law in cases of this kind.

This Court noted the following, which is extremely important to our case:

> [A]dmiralty courts, when invoked to protect rights rooted in state law, endeavor to determine the issues in accordance with the substantive law of the State. *Garrett v. Moore-McCormack Co.*, 317 U.S. 239, 245, 63 S.Ct. 246, 251, 87 L.Ed. 239 (1942). The policy expressed by a State Legislature in enacting a wrongful death statute is not merely that death shall give rise to a right of recovery, nor even that tortious conduct resulting in death shall be actionable, but that damages shall be recoverable when conduct of a particular kind results in death. It is incumbent upon a court enforcing that policy to enforce it all; it may not pick or choose.
>
> It is manifest, moreover, that acceptance of the respondent's argument would defeat the intent of Congress to preserve state sovereignty over deaths caused by maritime torts within the state's territorial waters. The legislative history of the Death on the High Seas Act discloses a

> clear congressional purpose to leave 'unimpaired the rights under state statutes as to deaths on waters within the territorial jurisdiction of the states.' S. Rep. No. 216, 66th Cong., 1st Sess. 3; H.R.Rep. No. 674, 66th Cong., 2d Sess.3. The record of the debate in the House of Representatives preceding passage of the bill reflects deep concern that the power of the states to create actions for wrongful death in no way be affected by enactment of the federal law. 59 Cong.Rec. 4482-4486.
>
> *There is no merit to the contention that application of state law to determine rights arising from death in state territorial waters is destructive of the uniformity of federal maritime law.* Even *Southern Pacific Co. v. Jensen,* which fathered the 'uniformity' concept, recognized that uniformity is not offended by 'the right given to recover in death cases.' 244 U.S. 205, at page 216, 37 S.Ct. 524, at page 529, 61 L.Ed. 1086. It would be an anomaly to hold that a state may create a right of action for death, but that it may not determine the circumstances under which that right exists. The power of a state to create such a right includes of necessity the power to determine when recovery shall be permitted and when it shall not. *Caldarola v. Eckert,* 332 U.S. 155, 67 S.Ct. 1569, 91 L.Ed. 1968.
>
> We hold, therefore, that the Court of Appeals was correct in viewing the basic question before it as one of interpretation of the law of New Jersey. (Emphasis added).

As the above quote illustrates, the record of the debate in the House of Representatives during discussion of the bill reflected a deep concern by Congress that the power of the states to create actions for wrongful death, within their territorial waters, should in no way be affected by enactment of the federal law.

A subsequent case that discusses that same Congressional Record is *Offshore Logistics, Inc. v. Tallentire*, 477 U.S. 207 (1986). In that case, this Court discussed DOHSA in detail. Section 7 of DOHSA provides:

> The provisions of any state statute giving or regulating rights of action or remedies for death shall not be affected by this chapter. Nor shall this chapter apply to the Great Lakes or to any waters within the territorial limits of any state, or to any navigable waters in the Panama Canal Zone. 46 U.S.C. § 767.

This Court noted that the Maritime Law Association (MLA), an organization of experts in admiralty law and a prime force in the movement for a federal wrongful death remedy, drafted the bill that was enacted as DOHSA. The MLA envisioned Section 7 to be a jurisdictional saving clause which completed the statutory scheme by ensuring continued concurrent state and federal jurisdiction over wrongful death claims arising from accidents on territorial waters. After discussing the *Southern Pacific Co. v. Jensen*, 244 U.S. 205 (1917) case, this Court stated the following:

> Although not intended to function as a substantive law saving clause, § 7 incidentally ensured that state courts exercising concurrent jurisdiction could, as under the 'saving to suitors' clause, apply such state remedies as were not inconsistent with substantive federal maritime law. It had been recognized that States could 'modify' or 'supplement' the federal maritime law by providing a wrongful death remedy enforceable in admiralty for accidents on territorial waters. See, *e.g.*, *Western Fuel Co. v. Garcia*, 257 U.S. 233, 42 S.Ct. 89, 66 L.Ed. 210 (1921); *Steamboat Co. v. Chase*, 16 Wall. 522, 32 L.Ed. 369

(1873). The reach of DOHSA's substantive provisions was explicitly limited to actions arising from accidents on the high seas, see 46 U.S.C. § 761, so as to 'prevent the Act from abrogating by its own force, the state remedies then available in state waters.' *Mobil Oil Corp. v. Higginbotham*, 436 U.S. 617, at 621-622, 98 S.Ct., at 2013. Thus, because DOSHA by its terms extended only to the high seas and therefore was thought not to displace these state remedies on territorial waters, see *Moragne v. States Marine Lines Inc.*, 398 U.S. 375, 90 S.Ct. 1772, 26 L.Ed.2d 339 (1970), § 7, as originally proposed, ensured that the Act saved to survivors of those killed on territorial waters the ability to pursue a state wrongful death remedy in state court.

Although the congressional debates on § 7 were exceedingly confused and often ill-informed, the remarks of the proponents of the bill amply support the theory that § 7 originally was intended to preserve the state courts' jurisdiction to provide wrongful death remedies under state law for fatalities on territorial waters. In the debate, the discussion focused almost exclusively on the intended jurisdictional effects of that section. See 59 Cong.Rec. 4482-4485 (1920). The proponents of § 7 before its amendment expressed their resolve to save to suitors the benefits of state judicial, and, derivatively, legislative jurisdiction within state territorial waters. See, *e.g.*, *id.*, at 4482 (remarks of Rep. Montague); *id.*, at 4483 (remarks of Rep. Montague)('the territorial waters of the States shall be retained within the jurisdiction and sovereignty of the States and their courts'); *ibid.* (remarks of Rep. Montague) (§ 7, as originally drafted, was 'put in out of abundant caution, to calm the minds or those who think that rights within the territorial waters will be usurped by the national law'). They also, however, stated

their firm intent to make exclusive federal jurisdiction over wrongful death actions arising on the high seas by restricting the scope of § 7 to territorial waters. See, *e.g.*, *ibid.* (remarks of Rep. Moore)('The purpose . . . is to give exclusive jurisdiction to the admiralty courts where the accident occurs on the high seas'). Thus, they asserted that the effect of § 7, as originally drafted, would be to confer exclusive jurisdiction on the federal admiralty courts for causes of action arising on the high seas. See, *e.g.*, *ibid.* (remarks of Rep. Sanders); *id.*, at 4484 (remarks of Rep. Volstead)('This bill clearly leaves the jurisdiction exclusive in the federal court outside the 3-mile limit'). It is against this backdrop that Representative Mann introduced his amendment to § 7. To the extent that Representative Mann's specific intent in introducing his amendment can be deciphered from his contribution to the debate's confusion, his purpose appears at least consistent with the idea that § 7 would serve as a jurisdictional saving clause, as his principal concern seems to have been the recognition of state court jurisdiction over DOHSA claims. Representative Mann had, in debates over an earlier draft of DOHSA, expressed his belief that federal admiralty courts had exclusive jurisdiction over accidents occurring on the high seas. See 51 Cong. Rec. 1928 (1914). In those debates, his principal concern was that state courts would continue to enjoy concurrent jurisdiction with federal admiralty courts over causes of action arising on the Great Lakes. *Ibid.* During the debates on the bill that because DOHSA, Representative Mann continued to express his concern regarding the jurisdiction of state courts over death claims growing out of accidents on territorial waters and the Great Lakes. See, *e.g.*, 59 Cong. Rec. 4483 (1920). However, he also argued in these later debates that if

state courts had ever previously exercised jurisdiction over death claims arising on the high seas, they should be permitted to continue to do so. See, *e.g.*, *ibid.* ('Though I do not know, I suppose if a man is injured on the high seas . . . and he can get service on the defendant, as a result of that injury, he can bring suit'); *id.*, at 4484 ('I remember this bill very distinctly in previous Congresses, and . . . I was under the impression that the bill was not intended to take away any jurisdiction which can now be exercised by any state court'); *ibid.* ('If this act as originally drawn by the admiralty lawyers was intended for the purpose of taking away jurisdiction now conferred by state statutes, it ought to be critically examined'). By suggesting the deletion of the language limiting the jurisdictional saving clause's scope only to territorial waters, Representative Mann intended to ensure that state courts could also serve as a forum for the adjudication of wrongful death actions arising out of accidents on the high seas. See, *e.g.*, *ibid.* (under Rep. Mann's amendment, where a state gives a cause of action and a death occurred on the high seas, 'there would be concurrent jurisdiction'); *id.*, at 4485 (if § 7 were amended as he suggested, 'the Act will not take away any jurisdiction conferred now by the states').

We conclude that Representative Mann's amendment extended the jurisdictional saving clause to the high seas but in doing so, it did not implicitly sanction the operation of state wrongful death statutes on the high seas in the same manner as the saving clause did in territorial waters. At page 224, 225.

The *Tallentire* case is discussed in the treatise written by Wright, Miller & Cooper, *Jurisdiction*, § 3672 as follows:

> Despite the Court's stated solicitude with regard to forum choice for survivors of those killed on the high seas, the actual holding of *Offshore Logistics*, which addressed a conflict that had developed among the Courts of Appeals as to the substantive effect of the Death on the High Seas Act, resolved that conflict against the interests of most survivors. Prior to *Offshore Logistics*, several lower courts had held that the first sentence of Section 7 of the Act preserved not only concurrent jurisdiction, but also any remedies provided by the state wrongful death statutes, many of which, unlike the federal statute, provide for non-pecuniary losses. Indeed, a literal reading of the statute, which states that it shall not affect the provisions of any state statute 'giving or regulating rights of action or remedies for death' would appear to support this view. Nonetheless, in *Offshore Logistics* the Court held that when an accident falls within the provisions of the Act, state wrongful death statutes are preempted. Thus, although survivors of a person killed in an accident on the high seas have a choice of forum, they may seek only the limited recovery provided by the Death on the High Seas Act. *If the same accident occurs within a marine league from shore, where the Death on the High Seas Act has no effect, the survivors can recover damages under the state wrongful death statute, including, when provided, reimbursement for non-economic losses.* (Emphasis added).

Petitioners argue that § 7 requires that federal maritime law be applied to the exclusion of state remedies in all maritime death cases, even in cases arising out of accidents within state territorial waters. However, a careful reading of the *Tallentire* decision shows that this Court rejected that argument, holding that preemption applies *only* in death cases arising on the high seas (DOHSA

cases). The *Tallentire* Court noted that as originally drafted, § 7 ensured that state law remedies were available in state courts where tortious deaths occurred in state territorial waters. However, the amended version of § 7 "did not implicitly sanction the operation of state wrongful death statutes on the high seas in the same manner as the saving clause did in territorial waters." *Tallentire* at 225. Clearly this Court felt that in DOHSA cases § 7 operates only as a jurisdictional saving clause, whereas for deaths occurring within territorial waters, § 7 preserves state jurisdiction as well as the state remedy. Therefore, under the reasoning of *Tallentire*, the Texas Appellate Court correctly interpreted this clause.

This Court's reasoning in *Tallentire* is sound and reflects the historical concept that states have broad rights to regulate conduct within their territorial waters. In *Just v. Chambers*, 312 U.S. 383, (1941) this Court recognized that states have broad powers to establish rights and liabilities affecting maritime affairs within their borders when state action "does not contravene any acts of Congress, nor work any prejudice to the characteristic features of the maritime law, nor interfere with its proper harmony and uniformity in its international and interstate relations." As this court said in *Romero v. International Terminal Operating Co.*, 358 U.S. 354, 373, (1959)

> It is true that state law must yield to meet the uniform federal maritime law when this court finds inroads on a harmonious system. But this limitation still leaves this state a wide scope. State created liens are enforced in admiralty state remedies for wrongful death and state statutes providing for the survival of actions, both historically absent from the relief offered by the

> admiralty, have been upheld when applied to maritime causes of action. Federal courts have enforced these statutes . . . Thus if one thing is clear it is that the source of law in saving-clause actions cannot be described in absolute terms. Maritime law is not a monistic system. State and federal governments jointly exert regulatory powers today as they have played joint roles in the development of maritime law throughout our history.

Nothing in *Moragne* or *Tallentire* renders the above reasoning obsolete.

In *Moragne*, this Court did not overrule *The Tungus*, but instead overruled *The Harrisburg*. There, after discussing the legislative history of the passage of DOHSA and The Jones Act, the Court stated the following:

> Read in light of the state of maritime law in 1920, we believe this legislative history indicates that Congress intended to ensure the continued availability of a remedy, historically provided by the states, for deaths in territorial waters; its failure to extend the Act to cover such deaths primarily reflected the lack of necessity for coverage by a federal statute, rather than an affirmative desire to insulate such deaths from the benefits of any federal remedy that might be available independently of the Act. The void that existed in maritime law up until 1920 was the absence of any remedy for wrongful death on the high seas. Congress, in acting to fill that void, legislated only to the three-mile limit because that was the extent of the problem. The express provision that state remedies in territorial waters were not disturbed by the Act ensured that Congress' solution of one problem would not create another by inviting the courts to find that the Act preempted the entire field,

> destroying the state remedies that had previously existed.
>
> The beneficiaries of persons meeting death on territorial waters did not suffer at that time from being excluded from the coverage of the Act. To the contrary, the state remedies that were left undisturbed not only were familiar but also may actually have been more generous than the remedy provided by the new Act. 398 U.S. at 397.

On the last page of the *Moragne* opinion (398 U.S. at 408), this Court noted that both DOHSA and the numerous state wrongful death acts had been implemented with success for decades. The effect of the *Moragne* decision was to give survivors a cause of action for unseaworthiness under the federal maritime law as well as for negligence under state wrongful death statutes. State sovereignty interests in applying their death statutes still outweigh the need for complete uniformity in federal maritime law.

Petitioners cite the *Sea-land Services, Inc. v. Gaudet*, 414 U.S. 573 (1974) case as authority for the proposition that damages for mental anguish cannot be recovered for a wrongful death cause of action in a maritime setting. However, as should be abundantly clear by this point, such is the situation only when the plaintiff brings a cause of action *solely under the general federal maritime law*, rather than *a specific state wrongful death statute*. It would appear that the cause of action created by *Moragne* was intended only to fill that narrow gap where a maritime fatality occurred in state territorial waters, but when the state did *not* recognize the concept of unseaworthiness. In reading the entire *Gaudet* case, it is clear that the *Moragne*

decision should be read as filling in a narrow gap, and does not attempt to usurp the powers of the various states through their wrongful death statutes.

Petitioners cite four circuit court cases for the proposition that *Moragne* eliminated state law causes of action for deaths in territorial waters: *Lyon v. The Ranger III*, 858 F.2d 22, 27 (1st Cir. 1988); *Nelson v. United States*, 639 F.2d 469 (9th Cir. 1980); *Matter of S/S Helena*, 529 F.2d 744 (5th Cir. 1976); *Lamp v. United States Steel Corp.*, 436 F.2d 1256, 1279 (6th Cir. 1970), *cert. denied* 402 U.S. 987, *reh'g denied* 403 U.S. 924 (1971). However, all of these cases involve third party actions brought by Jones Act seamen in admiralty courts. Just as federal courts have an interest in assuring that DOHSA cases are administered uniformly, they may also have such an interest in cases brought by Jones Act seamen. However, the case at bar does not present the issue of whether federal law preempts state law in such cases. Petitioners ask this Court to overrule a long line of precedent which allows states to provide a remedy for deaths occurring in their territorial waters based on three cases with facts inapposite to those in the present case.

Finally, *Lyon v. The Ranger, III*, 858 F.2d 22 (1st Cir. 1988) does not stand for the proposition for which it is cited by Petitioners. The *Lyon* case does not discuss whether federal law should preempt a state's wrongful death statute. In fact, it does not even refer to the *Moragne* decision. In *Lyon* the Court decided that Massachusetts state law should determine the definition of "joint enterprise" in a wrongful death case in which the accident took place one-quarter (1/4) of a mile from the Massachusettes coast. *Lyon*, 858 F.2d at 27.

In view of the above, Respondents submit that the Texas State Court correctly allowed judgment for Respondents for mental anguish and pre-judgment interest, since Texas statutory law provides for both.

C. THE TORT MADE THE BASIS OF THIS SUIT DOES NOT CONSTITUTE A MARITIME TORT WITHIN THE MEANING OF FEDERAL MARITIME LAW, SINCE THE CASE INVOLVES A NON-MARITIME CIVILIAN VOLUNTEER WHO WAS KILLED ON A DOCK

Petitioners further assume in their brief that all relevant acts took place on the water. Such a description is not accurate, since Dau was crushed on the side of the dock, not while he was in the water. Case law exists to support the proposition that this case does not involve a maritime tort.

A case amazingly similar to our case is *T. Smith & Son, Inc. v. Taylor*, 276 U.S. 179 (1928). In that case, T. Smith & Son was a stevedoring company which was unloading a vessel lying in the Mississippi River at a dock in New Orleans. Taylor was employed as a longshoreman by the company. At the time of the accident, cargo was being hoisted out of the hold of the vessel to deck skids. The cargo was then swung to trucks operated upon a stage that rested solely upon the wharf and projected a few feet over the water to or near the side of the vessel. Taylor was standing on the stage when a sling, loaded with five sacks of soda each weighing 200 pounds, was being lowered over the side by means of a winch on

the vessel. The sling was swinging back and forth, and while Taylor was attempting to catch and steady the sling, it struck him and knocked him off the stage into the water, where sometime later he was found dead.

The defendant, Smith & Son, claimed that the case was exclusively within the federal admiralty and maritime jurisdiction. This Court determined that if the cause of action arose *upon the river*, then the rights of the parties were controlled by maritime law, but if the cause of action arose upon the *land*, state law applied. The Court noted that the stage and wharf on which the deceased was working *were an extension of the land*. The Court ruled that the blow by the sling was what gave rise to the cause of action, and since it was given and took effect while the deceased was upon land, it was the sole, immediate and proximate cause of his death. Accordingly, state law controlled.

That line of reasoning was followed in the case of *Executive Jet Aviation, Inc. v. City of Cleveland, Ohio*, 409 U.S. 249 (1972). In that case, an airplane departed from the Cleveland airport, hit a flock of seagulls, lost power, crashed and ultimately sank in navigable waters of Lake Erie, approximately 1/5 of a statute mile offshore. Suit was filed, invoking federal admiralty jurisdiction under 28 U.S.C. § 1333. This Court noted that the determination of the question whether a tort is "maritime", and thus an admiralty claim, has traditionally depended upon the locality of the wrong. In the opinion, the Court discusses the *Smith & Son* case as follows:

> But it is the perverse and casuistic borderline situations that have demonstrated some of the problems with the locality test of maritime tort

> jurisdiction. In *Smith & Son v. Taylor,* 276 U.S. 179, 48 S.Ct. 228, 72 L.Ed. 520 (1928), for instance, a longshoreman unloading a vessel was standing on the pier when he was struck by a cargo-laden sling from the ship and knocked into the water where he was later found dead. This Court held that there was no admiralty jurisdiction in that case, despite the fact that the longshoreman was knocked into the water, because the blow by the sling was what gave rise to the cause of action, and it took effect on the land. Hence, the Court concluded, '[t]he substance and consummation of the occurrence which gave rise to the cause of action took place on land.' 276 U.S., at 182, 48 S.Ct., at 229. In the converse factual setting, however, where a longshoreman working on the deck of a vessel was struck by a hoist and knocked onto the pier, the Court upheld admiralty jurisdiction because the cause of action arose on the vessel. *Minnie v. Port Huron Terminal Co.,* 295 U.S. 647, 55 S.Ct. 884, 79 L.Ed. 1631 (1935). See also *The Admiral Peoples,* 295 U.S. 649, 55 S.Ct. 885, 79 L.Ed. 1633 (1935). At page 255.

Another case citing the *Smith & Son* case as authority for the principle that maritime law does not apply to accidents on piers is the case of *Rodrigue v. Aetna Casualty & Surety Company,* 395 U.S. 352 (1969). In that case two men were killed on an artificial island located on the outer continental shelf off the Louisiana coast more than one marine league. The Court, in determining that The Death on the High Seas Act was not applicable, stated that it was not enough to have the accident happen more than a marine league off of the coast, but that it must also occur on the high seas. The Court noted the following:

> Admiralty jurisdiction has not been construed to extend to accidents on piers, jetties, bridges, or even ramps or railways running into the sea.

A more recent case citing the same concept is *Karpovs v. State of Mississippi*, 663 F.2d 640 (5th Cir. 1981). In that case, a raised drawbridge led to a fatality. In disposing of the question of whether federal maritime law controls, the Court stated the following:

> We first dispose of Appellant's assertion that she has stated a claim in admiralty. Maritime jurisdiction does not extend to torts occurring on piers, bridges, jettys, or even ramps or railways running into the sea. *Rodrigue v. Aetna*, 395 U.S. 352, 89 S.Ct. 1835, 23 L.Ed.2d 360 (1969). Any suggested inroads on this longstanding rule ended in 1972, when the Supreme Court held that in addition to a maritime locality, admiralty jurisdiction will not lie unless there is a significant relationship between the tort claim and traditional maritime activity. *Executive Jet Aviation & Corporation v. City of Cleveland, Ohio*, 409 U.S. 249, 93 S.Ct. 493, 34 L.Ed.2d 454 (1972). *Richardson v. Foremost Insurance Company*, 641 F.2d 314 (5th Cir. 1981).

Under the above reasoning Respondents assert that this case does not fall within federal maritime jurisdiction because there was no significant relationship between the negligence claim and traditional maritime activity.

CONCLUSION AND PRAYER FOR RELIEF

Respondents respectfully urge that the Texas Trial Court correctly entered judgment in favor of Respondents under the Texas Wrongful Death Act, which provides for

recovery of damages for mental anguish. A long line of precedent establishes that state wrongful death acts provide for recovery in cases of tortious deaths occurring within state territorial waters. Further, the Texas Appellate Court correctly ruled that the accident made the basis of this suit did not constitute a maritime tort.

WHEREFORE, PREMISES CONSIDERED, Respondents request that the Petitioners' Writ of Certiorari be denied.

Respectfully submitted

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APPENDIX "A"

NO: B127026

ESTATE OF DAU VAN TRAN, ET AL	§	IN THE
	§	DISTRICT
VS.	§	COURT
	§	OF JEFFERSON
TEXACO REFINING & MARKETING	§	COUNTY, TEXAS
	§	
INC., TEXACO MARINE SERVICES INC., and FARMER BOY'S CATFISH	§	60TH JUDICIAL DISTRICT
	§	
KITCHENS INTERNATIONAL, INC.	§	
	§	

Original Answer of Defendants
Texaco Marine Services Inc. and
Texaco Refining and Marketing Inc.

TO THE HONORABLE JUDGE OF SAID COURT:

COMES NOW Texaco Marine Services Inc., ("TMSI") and Texaco Refining and Marketing Inc., ("TRMI"), defendants herein, and file their original answer to the plaintiff's original petition, and in support thereof, respectfully show this Court as follows:

1. The plaintiffs' original petition is so incorrect and mistaken that it must be generally denied as authorized by Rule 92 of the Texas Rules of Civil Procedure, thus requiring that the plaintiffs prove their claims and allegations by a preponderance of the credible evidence as is required by the Constitution and laws of the State of Texas.

2. Without waiving the foregoing general denial, for further answer, if any be necessary, TMSI and TRMI reserve at this time their right to amend their answer to

the plaintiffs' original petition after they have an opportunity to more closely investigate these claims, as is their right and privilege under the Rules of Civil Procedure and the laws of the State of Texas.

Affirmative Defenses

3. Without waiving the foregoing general denial, for further answer, if any be necessary, and as separate and complete defenses thereto, TMSI and TRMI aver the following:

4. Plaintiffs have failed to join all necessary and indispensable parties.

5. Any injuries suffered or sustained by plaintiffs or plaintiffs' decedent at the time and place or on the occasion mentioned in plaintiffs' original petition were caused, in whole or in part, and were contributed to by the negligence, fault or want of care on the part of the plaintiffs' decedent and not by any negligence, fault or want of care on the part of TMSI or TRMI.

6. Any injuries sustained or suffered by plaintiffs or plaintiffs' decedent at the time and place or on the occasion mentioned in plaintiffs' original petition were not caused or contributed to by any fault or neglect on the part of TMSI or TRMI, or of anyone for whom TMSI or TRMI is or was responsible, or to the breach of any duty owed to plaintiffs or plaintiffs' decedent and the said injuries do not give rise to any rights cognizable herein, but were due and occasioned solely by and to the fault and negligence of third parties for whom TMSI or TRMI is and was not responsible.

7. Plaintiffs are barred from recovery by the doctrine of *volenti non fit injuria* or assumption of risk.

8. Any injuries sustained by the plaintiffs were the result of an unavoidable accident insofar as TMSI or TRMI is concerned and not due to any negligence or breach of legal duty of either of their parts.

WHERE, PREMISES CONSIDERED, defendants Texaco Marine Services Inc. and Texaco Refining & Marketing Inc. pray that plaintiffs take nothing by their suit, that defendants go hence with costs, and for such other relief as defendants may show themselves justly entitled to receive.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of the original answer of defendants Texaco Marine Services Inc. and Texaco Refining and Marketing Inc. was mailed postage prepaid, first class mail, return receipt requested to Jon B. Burmeister, Moore, Landrey, Garth & Jones, 285 Liberty, Suite 1900, Beaumont, Texas, 77001, and Steven C. Barkley, Evans, Moses & Barkley, 815 Goodhue Building, Beaumont, Texas 77701 on this 31st day of August, 1987.

/s/ Michael C. Farrow
Michael C. Farrow

MOTION FILED
JUN 8 1990

No. 89-1754

IN THE

Supreme Court of the United States

OCTOBER TERM, 1989

TEXACO REFINING AND MARKETING INC., and
TEXACO MARINE SERVICES INC.,

Petitioners,

—v.—

THE ESTATE OF DAU VAN TRAN,
VI THI PHAM and DO VAN TRAN,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO
NINTH DISTRICT COURT OF APPEALS
OF THE STATE OF TEXAS
AT BEAUMONT, TEXAS

MOTION BY THE MARITIME LAW ASSOCIATION OF THE UNITED STATES TO FILE *AMICUS CURIAE* BRIEF AND BRIEF IN SUPPORT OF A PETITION FOR A WRIT OF CERTIORARI

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TABLE OF CONTENTS

PAGE

Table of Authorities ii

Motion to File *Amicus Curiae* Brief 1

Nature of Applicant's Interest 2

MLA Can Make a Unique Contribution on Relevant Issues 5

Brief in Support of the Petition for a Writ of Certiorari 7

Questions of Law Presented 8

Interest of *Amicus Curiae* 8

Summary of Reasons for Granting the Writ 8

Reasons for Granting the Writ 9

1. Since the Tort Arose from Traditional Maritime Activity, the State Court Defied Supreme Court Precedent When It Refused to Apply The General Maritime Law. 9
2. The Uniformity Doctrine Endorsed by This Court in *Moragne* Requires Application of the General Maritime Law to Cases Involving Injuries Occurring in State Territorial Waters. 9
3. The State Court Was Required to Apply the General Maritime Law as Interpreted by the Federal Courts. 11

Conclusion 12

TABLE OF AUTHORITIES

Cases:	PAGE
Alfaro v. Dow Chemical, 786 S.W.2d 674 (1990).....	5
Askew v. American Waterways Operators, Inc., 411 U.S. 325 (1973)	4
Chelentis v. Luckenbach S.S. Co., 247 U.S. 372 (1918)	9, 11
Chick Kam Choo v. Exxon Corp., 486 U.S. 140 (1988)	4
Executive Jet Aviation, Inc. v. Cleveland, 409 U.S. 249 (1972)	9
Kermerec v. Compagnie Generale Transatlantique, 358 U.S. 625 (1959)	9
Knickerbocker Ice Co. v. Stewart, 253 U.S. 149 (1920)	9
Kossick v. United Fruit Co., 365 U.S. 731 (1961)	11
Mobil Oil Corp. v. Higginbotham, 436 U.S. 618 (1978)	11
Moragne v. States Marine Lines, Inc., 398 U.S. 375 (1970) 9, 10, 11	
Nelson v. United States, 639 F.2d 469 (9th Cir. 1980)	11
Offshore Logistics, Inc. v. Tallentire, 477 U.S. 207 (1986) 4, 5, 11	
Panama R.R. Co. v. Johnson, 264 U.S. 375 (1924) ..	9
Pope & Talbot, Inc. v. Hawn, 346 U.S. 406 (1953) ..	9
Ray v. Atlantic Richfield Co., 435 U.S. 151 (1978)...	4
Romero v. International Terminal Co., 358 U.S. 354 (1959)	9

PAGE

Sea-Land Services, Inc. v. Gaudet, 414 U.S. 573 (1974) 11

Southern Pacific Co. v. Jensen, 244 U.S. 205 (1917) . 11

S/S Helena (Matter of), 529 F.2d 744 (5th Cir. 1976) 11

The Harrisburg, 119 U.S. 199 (1886)..... 10

The Lottawanna, 88 U.S. (21 Wall.) 558 (1875).....10, 11

The Tungus v. Skovgaard, 358 U.S. 588 (1959) 10

United States Steel Corp. (Petition of), 436 F.2d 1256 (6th Cir. 1970), *cert. denied*, 402 U.S. 987 (1971).. 11

Washington (State of) v. W.C. Dawson & Co., 264 U.S. 219 (1924) 9

Statutes:

Federal Arbitration Act,
9 U.S.C. §§ 1-15 2

United States Inland Navigation Rules,
33 U.S.C. §§ 2001-2073 3

Water Pollution Control Act Amendments of 1972,
33 U.S.C. §§ 1251-1376 3

Admiralty Extension Act,
46 U.S.C. § 740..... 9

Death on the High Seas Act,
46 U.S.C. §§ 761-768 5
46 U.S.C. App. §§ 761-767..... 5

Carriage of Goods by Sea Act,
46 U.S.C. §§ 1300-1315 2

PAGE

Conventions and Treaties:

Assistance and Salvage Convention (1910), 37 Stat. 1658 (1913), *reprinted in* 6 M.M. COHEN, BENEDICT ON ADMIRALTY, Doc. No. 4-1 (7th rev'd ed. 1990) ("BENEDICT") 3

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Collision Convention (1910), *reprinted in* 6 BENEDICT, Doc. No. 3-2 3

Limitation of Liability for Maritime Claims (1976), *reprinted in* 6 BENEDICT, Doc. No. 5-4 3

Limitation of Liability of Owners of Sea-Going Ships (1957), *reprinted in* 6 BENEDICT, Doc. No. 5-2 3

Maritime Liens and Mortgages Convention (1967), *reprinted in* 6A BENEDICT, Doc. No. 8-3..... 3

1972 Convention for Preventing Collisions at Sea, 28 U.S.T. 3459, T.I.A.S. 8587, U.N.T.S. 15824, as amended, T.I.A.S. 10672, *reprinted in* 6 BENEDICT, Doc. No. 3-4 3

Ocean Bills of Lading Convention (The Hague Rules) (1924), 120 L.N.T.S. 155, *reprinted in* 6 BENEDICT, Doc. No. 1-1 3

Regulations:

33 C.F.R. ch. 1, subch. D, Special Note (1987)..... 3

Rules:

Rules of the Supreme Court of the United States, Rule 37.2..... 1

PAGE

Other:

Maritime Law Association of the United States ("MLA") Articles of Association 2

MLA Resolutions:

MLA Minutes, MLA Doc. No. 588 (1975)..... 4

MLA Minutes, MLA Doc. No. 669 (1986)..... 4

MLA Report, MLA Doc. No. 671 (1987)..... 4

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AT BEAUMONT, TEXAS

MOTION BY THE MARITIME LAW ASSOCIATION OF THE UNITED STATES TO FILE *AMICUS CURIAE* BRIEF IN SUPPORT OF A PETITION FOR A WRIT OF CERTIORARI

Applicant, The Maritime Law Association of the United States ("MLA"), moves the Court for permission to file an *amicus curiae* brief in support of the Petition for a Writ of Certiorari filed by Texaco Refining and Marketing Inc. and Texaco Marine Services Inc. ("Petitioners"). Petitioners have given consent to the MLA to file an *amicus* brief, but Respondents have refused to consent. Accordingly, leave to file must be sought pursuant to Rule 37.2.

NATURE OF APPLICANT'S INTEREST

Applicant has a very strong interest in the disposition of this case. MLA is a nationwide bar association founded in 1899. It has a membership of about 3600 attorneys, federal judges, law professors and others interested in maritime law. It is affiliated with the American Bar Association and is represented in that Association's House of Delegates.

MLA's attorney members, most of whom are specialists in admiralty law, represent all maritime interests—shipowners, charterers, cargo owners, shippers, forwarders, port authorities, seamen, longshoremen, passengers, marine insurance underwriters and other maritime claimants and defendants.

MLA's purposes are stated in its Articles of Association:

> The objectives of the Association shall be to advance reforms in the Maritime Law of the United States, to facilitate justice in its administration, *to promote uniformity in its enactment and interpretation*, to furnish a forum for the discussion and consideration of problems affecting the Maritime Law and its administration, to participate as a constituent member of the Comité Maritime International and as an affiliated organization of the American Bar Association, and to act with other associations in efforts to bring about a greater harmony in the shipping laws, regulations and practices in different nations.

(Emphasis added.)

In furtherance of these objectives MLA, during the ninety-one years of its existence, has sponsored a wide range of legislation dealing with maritime matters including the Carriage of Goods by Sea Act[1] and the Federal Arbitration Act.[2] The

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1 46 U.S.C. §§ 1300-1315.

2 9 U.S.C. 1-15.

MLA has also cooperated with congressional committees in the formulation of other maritime legislation.[3]

MLA is also participating in several projects of a maritime legal nature undertaken by agencies of the United Nations, including its Commissions on Trade Law ("UNCITRAL") and Trade and Development ("UNCTAD"). It works closely with the International Maritime Organization ("IMO").

MLA has actively participated, as one of some forty-nine national maritime law associations constituting the Comité Maritime International,[4] in the movement to achieve maximum international uniformity in maritime law through the medium of international conventions.[5]

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3 *E.g.*, 1972 Water Pollution Control Act Amendments, 33 U.S.C. §§ 1251-1376; implementation of the 1972 Convention for Preventing Collisions at Sea, 28 U.S.T. 3459, T.I.A.S. 8587, U.N.T.S. 15824, as amended, T.I.A.S. 10672, *reprinted in* 6 M.M. COHEN, BENEDICT ON ADMIRALTY, Doc. No. 3-4 at 3.35 to 3-78.2 (7th rev'd ed. 1990) (hereinafter "BENEDICT"), *see* 33 C.F.R. ch. 1, subch. D, Special Note, at 160 (1987); United States Inland Navigation Rules, 33 U.S.C. §§ 2001-2073.

4 These now include the national associations of Argentina, Australia and New Zealand, Belgium, Brazil, Bulgaria, Canada, Chile, China, Colombia, Costa Rica, Czechoslovakia, Denmark, Egypt, Finland, France, Federal Republic of Germany, German Democratic Republic, Greece, Hong Kong, Iceland, India, Indonesia, Ireland, Israel, Italy, Japan, Korea, Mexico, Morocco, The Netherlands, Nigeria, Norway, Panama, Peru, Philippines, Poland, Portugal, Senegal, Spain, Sri Lanka, Sweden, Switzerland, Turkey, United Kingdom, United States, Uruguay, Union of Soviet Socialist Republics, Venezuela and Yugoslavia.

5 *E.g.*, Assistance and Salvage (1910), 37 Stat. 1658 (1913), *reprinted in* 6 BENEDICT, Doc. No. 4-1 at 4-2 to 4-10; Ocean Bills of Lading (The Hague Rules) (1924), 120 L.N.T.S. 155, *reprinted in* 6 BENEDICT, Doc. No. 1-1 at 1-2 to 1-19; Collision (1910), *reprinted in* 6 BENEDICT, Doc. No. 3-2 at 3-11 to 3-19; Limitation of Liability of Owners of Sea-Going Ships (1957), *reprinted in* 6 BENEDICT, Doc. No. 5-2 at 5-11 to 5-29; Maritime Liens and Mortgages (1967), *reprinted in* 6A BENEDICT, Doc. No. 8-3 at 8-25 to 8-32; Civil Liability for Oil Pollution Damages (1969), U.N.T.S. 1409, *reprinted in* 6 BENEDICT, Doc. No. 6-3 at 6-62.103 to 6-76.3; and Limitation of Liability for Maritime Claims (1976), *reprinted in* 6 BENEDICT, Doc. No. 5-4 at 5-32.1 to 5-44.3.

MLA believes uniformity in maritime law, both national and international, is of great importance. This concern has been repeatedly expressed by our membership and standing committees. For example, in 1975 the MLA Standing Committee on Uniformity of U.S. Maritime Law recommended that steps be taken to persuade congressional committees "that nationwide and, in fact, world-wide uniformity in the Maritime Law is highly desirable, not only from the standpoint of those involved with maritime commerce but from that of the public as well." A resolution to that effect was unanimously adopted at the MLA Annual Spring Meeting on April 25, 1975.[6] A substantially identical resolution was adopted by the American Bar Association in 1976. This policy has been reaffirmed by the MLA on several occasions, most recently in a 1986 resolution.[7]

MLA has, in furtherance of the uniformity policy and resolutions, filed *amicus* briefs in a number of cases, including four briefs accepted by this Court.[8]

It is also the policy of MLA to file briefs as *amicus curiae* only when important issues of maritime law are involved and the Court's decision may substantially affect the uniformity of maritime law.

Such a situation exists in this case. The general maritime law must be applied in any case involving injuries or damages resulting from traditional maritime activity. Since negligence in the performance of a traditional maritime activity—the navigation of a loaded commercial tanker—was alleged and found to have proximately caused the injury, the Texas court's application of state law to this action constitutes a grave threat to uniformity of U.S. maritime law and invites

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6 MLA Minutes, MLA Doc. No. 588 at 6397-98 (1975).

7 MLA Minutes, MLA Doc. No. 669 at 8769 (1986).

8 *Chick Kam Choo v. Exxon Corp.*, 486 U.S. 140 (1988); *Offshore Logistics, Inc. v. Tallentire*, 477 U.S. 207 (1986); *Ray v. Atlantic Richfield Co.*, 435 U.S. 151 (1978); *Askew v. American Waterways Operators, Inc.*, 411 U.S. 325 (1973). For a more comprehensive listing, see MLA Report, MLA Doc. No. 671 at 8862-63 (1987).

forum shopping and unpredictability in an area in which consistency is essential. Moreover, a failure to correct the Texas court's holding that state courts are free to "follow their own notions about this field of law" would produce a chaos of conflicting and erratic decisions and would amount to an endorsement of fortuity in direct contravention of one of the central tenets of maritime law and of the goals of MLA.

Uncertainty about the measure of damages available for a maritime personal injury will make it much more difficult for maritime attorneys to assess the risks faced by their clients and will discourage settlement, thus adversely affecting the practices of MLA's membership and the wide variety of interests represented. Given the lack of a *forum non conveniens* doctrine in the state courts in question, *see Alfaro v. Dow Chemical*, 786 S.W.2d 674 (1990), there is likely to be a proliferation of disparate results in maritime personal injury cases if the state court's declaration that it is free to ignore federal maritime precedent is permitted to stand. Accordingly, we urge that this motion be granted.

MLA CAN MAKE A UNIQUE CONTRIBUTION ON RELEVANT ISSUES

MLA's perspective, arising from its interest in the uniformity and predictability of U.S. maritime law, necessarily is different from those of the parties to this particular suit, who are most interested in its outcome as it affects their individual positions. MLA can comment objectively about the need for review by this Court in order to ensure national uniformity on the issues presented.

MLA was an active participant in the drafting and adoption of the Death on the High Seas Act.[9] MLA also appeared as *amicus* in *Tallentire*, in which this Court held that state law remedies were unavailable to supplement those provided by the Death on the High Seas Act. 477 U.S. at 233. While the Petitioners have addressed several errors on the part of

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9 46 U.S.C. §§ 761-768. *See also* 46 U.S.C. App. §§ 761-767.

the Texas state court, MLA will concentrate only on the need for uniformity in maritime actions regardless of the forum, and on the dangers of permitting the state decision to stand.

Dated: June 8, 1990

Respectfully submitted,

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1989

No. 89-1754

TEXACO REFINING AND MARKETING INC., and
TEXACO MARINE SERVICES INC.,

Petitioners,

—v.—

THE ESTATE OF DAU VAN TRAN,
VI THI PHAM and DO VAN TRAN,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO
NINTH DISTRICT COURT OF APPEALS
OF THE STATE OF TEXAS
AT BEAUMONT, TEXAS

BRIEF OF THE MARITIME LAW ASSOCIATION OF THE UNITED STATES, AS *AMICUS CURIAE*, IN SUPPORT OF THE PETITION FOR A WRIT OF CERTIORARI

The Maritime Law Association of the United States ("MLA") respectfully submits this brief as *amicus curiae* in support of the Petition for Certiorari by Texaco Refining and Marketing Inc. and Texaco Marine Services Inc. ("Petitioners").

QUESTIONS OF LAW PRESENTED

1. Whether a state court must apply the general maritime law in an action arising from the negligent operation of a commercial vessel on navigable waters within a state?

2. Whether a court may supplement a recovery in a maritime case by including an element of damages available under state law but unrecoverable under the maritime law?

INTEREST OF *AMICUS CURIAE*

This is stated in the Motion which precedes this Brief.

SUMMARY OF REASONS FOR GRANTING THE WRIT

Because the accident resulted from the negligent navigation or operation of a vessel upon navigable waters, the suit falls within the admiralty and maritime jurisdiction and is governed by the general maritime law as applied in the federal courts, whether or not the plaintiff was a seaman and wherever the effects of the negligence were produced. The general maritime law must be applied uniformly to maritime cases regardless of the forum in which the case is tried. Thus, the Texas state court was not at liberty to apply the state law of recoverable damages nor to develop its own notions of maritime law on this subject since there is specific and unambiguous federal maritime case law rejecting the element of damages—mental anguish of the decedent's family—sought here.

REASONS FOR GRANTING THE WRIT

1. SINCE THE TORT AROSE FROM TRADITIONAL MARITIME ACTIVITY, THE STATE COURT DEFIED SUPREME COURT PRECEDENT WHEN IT REFUSED TO APPLY THE GENERAL MARITIME LAW.

The Texas court of appeals correctly recited the holding of *Executive Jet Aviation, Inc. v. Cleveland*, 409 U.S. 249 (1972), that there must be "some substantial relationship between the tort and traditional maritime activities . . . ." Petition App. A at 14a. The court also correctly held that traditional maritime activities include "navigation or commerce on navigable waters," *id.*, precisely the activities that were alleged and found to have proximately caused the damages at issue. *Id.* at 3a-9a. The court's own holdings thus confirm the nature of this case as within the heart of the admiralty jurisdiction, whether or not the decedent was a seaman or other maritime worker, *see Kermerac v. Compagnie Generale Transatlantique*, 358 U.S. 625 (1959), and even if the effects of the maritime tort took place on land. 46 U.S.C. § 740.

2. THE UNIFORMITY DOCTRINE ENDORSED BY THIS COURT IN *MORAGNE* REQUIRES APPLICATION OF THE GENERAL MARITIME LAW TO CASES INVOLVING INJURIES OCCURRING IN STATE TERRITORIAL WATERS.

While state courts are competent to hear most matters falling within the admiralty jurisdiction, they are bound in such cases to apply the general maritime law as interpreted by the federal courts. *See, e.g., Romero v. International Terminal Co.*, 358 U.S. 354, 367 n.23 (1959); *Pope & Talbot, Inc. v. Hawn*, 346 U.S. 406, 409 (1953); *Panama R.R. Co. v. Johnson*, 264 U.S. 375, 385-87 (1924); *State of Washington v. W.C. Dawson & Co.*, 264 U.S. 219, 228 (1924); *Knickerbocker Ice Co. v. Stewart*, 253 U.S. 149, 157-61, 164 (1920); *Chelentis v. Luckenbach S.S. Co.*, 247 U.S. 372 (1918). Thus, it was error for the state court to apply the state law of

damages, even though the tort occurred in state territorial waters.

In the seminal case of *Moragne v. States Marine Lines, Inc.*, 398 U.S. 375 (1970), this Court held that the general maritime law provided an action for "death caused by a violation of maritime duties" in state territorial waters. *Id.* at 409. *See id.* at 393, 397-98, 401-03. That is precisely the circumstance at issue here. The *Moragne* court left no doubt about the need for uniform application of the general maritime law in cases involving death resulting from a breach of maritime duties and rejected the chaotic patchwork that would result from engrafting state law remedies:

> Our recognition of a right to recover for wrongful death under general maritime law will assure uniform vindication of federal policies, removing the tensions and discrepancies that have resulted from the necessity to accommodate state remedial statutes to exclusively maritime substantive concepts. Such uniformity not only will further the concerns of both the 1920 Acts but also will give effect to the constitutionally based principle that federal admiralty law should be "a system of law coextensive with, and operating uniformly in, the whole country." *The Lottawanna*, 21 Wall. 558, 575 (1875).

Id. at 402-03 (citations omitted).

In overruling *The Harrisburg*, 119 U.S. 199 (1886), on which *The Tungus v. Skovgaard*, 358 U.S. 588 (1959), was based, *see* 398 U.S. at 409, 377-78, the *Moragne* Court thought it had put to rest any arguments based on *The Tungus*, commenting that "the torrent of difficult litigation that has swirled about *The Harrisburg*, *The Tungus*, which followed upon it, and the problems of federal-state accommodation they occasioned" would be obviated by *Moragne's* "recognition of a remedy for wrongful death under general maritime law [which] can be expected to bring more placid waters." *Id.* at 408. The state court here should not be permitted to recreate the turbulence which the *Moragne* court sought to calm once and for all.

3. THE STATE COURT WAS REQUIRED TO APPLY THE GENERAL MARITIME LAW AS INTERPRETED BY THE FEDERAL COURTS.

In a maritime action, a court may look to state law only in the absence of a federal statute or precedent. *See, e.g., Kossick v. United Fruit Co.*, 365 U.S. 731, 742 (1961); *Southern Pacific Co. v. Jensen*, 244 U.S. 205, 216 (1917). State courts are not free to supplement with state law the remedies granted by the maritime law for breach of a maritime duty. *See Offshore Logistics, Inc. v. Tallentire*, 477 U.S. 207, 233 (1986); *Chelentis*, 247 U.S. at 382-84.

Since a matter of maritime law was at issue, the state court was obligated to follow the rulings of the federal circuit courts which have expressly held that *Moragne* provides a uniform remedy for breach of a maritime duty. *See Nelson v. United States*, 639 F.2d 469, 473 (9th Cir. 1980); *Matter of S/S Helena*, 529 F.2d 744, 753 (5th Cir. 1976); *Petition of United States Steel Corp.*, 436 F.2d 1256, 1279 (6th Cir. 1970), *cert. denied*, 402 U.S. 987 (1971). As a matter of general maritime law, the state court was also restricted to awarding only those elements of damages available under the general maritime law, particularly because there was a conflict in this instance between the state law and the general maritime law about whether damages for the survivors' mental anguish can be recovered. *Compare* Petition App. C at 27a *with Sea-Land Services, Inc. v. Gaudet*, 414 U.S. 573, 585-86 & n.17 (1974). *Gaudet* expressly states that damages for survivors' mental anguish may *not* be recovered under the general maritime law. *Id. See Mobil Oil Corp. v. Higginbotham*, 436 U.S. 618, 622 (1978).

The Texas court's shocking assertion that the state courts are free to "follow their own notions about this field of law," Petition App. A at 16a-17a, defies the history of the uniformity doctrine in this Court. *See, e.g., The Lottawanna*, 88 U.S. (21 Wall.) 558, 575 (1875).

CONCLUSION

We most respectfully urge this Honorable Court to grant the Petition for Certiorari.

Dated: June 8, 1990.

Respectfully submitted,

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PROOF OF SERVICE BY MAIL

I am a citizen of the United States and a resident of the City of Brooklyn and the County of Kings; I am over the age of eighteen years and not a party to the within action; my business address is: One Battery Park Plaza, New York, New York 10004.

On June 8, 1990, I served the within Motion to File *Amicus Curiae* Brief and Brief in Support of the Petition for a Writ of Certiorari in re: "Texaco Refining and Marketing Inc. and Texaco Marine Services Inc., v. The Estate of Dau Van Tran, Vi Thi Pham and Do Van Tran" in the United States Supreme Court, October Term 1988, No. 89-1754, on the Parties in said action by placing three copies thereof enclosed in a sealed envelope with postage fully prepaid, in the United States post office mail box at New York, New York, addressed as follows:

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All Parties required to be served have been served.

I certify (or declare), under penalty of perjury, that the foregoing is true and correct.

Executed on June 8, 1990 at New York, New York.

/s/ LIZABETH L. BURRELL
Lizabeth L. Burrell